2089.

SUPREME COURT OF THE UNITED STATES.

No. 190.

THE PHILADELPHIA AND READING RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ELIAS H. DERBY.

IN ERROR TO THE CIRCUIT COURT, UNITED STATES, FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Writ of error	1	1
Certificate of clerk	2	1
Citation	3	2
Acceptance of service of citation	3	2
Declaration	4	2
Plea of defendants	20	11
Jury	21	12
Bill of exceptions	22	12
Judge Grier's charge to the jury	42	24
Verdict of the jury	43	24
Motion for new trial	43	25
New trial refused	44	25
Judgment	44	25
Commission to Boston and depositions taken under it	45	25
Interrogatories to Lewis Kirk	47	26
Cross interrogatories to Lewis Kirk	62	34
Interrogatories to John E. Thayer	49	27
Cross interrogatories to John E. Thayer	64	35
Interrogatories to P. P. F. Dogrand	50	28
Cross interrogatories to P. P. F. Dogrand	65	36
Interrogatories to John L. Andrews	51	29
Cross interrogatories to John L. Andrews	66	36

GIDEON, Print.

	Original.	Print.
Interrogatories to Joshua Tucker	53	29
Cross interrogatories to Joshua Tucker	67	37
Interrogatories to Richard Palmer	54	30
Cross interrogatories to Richard Palmer	67	37
Interrogatories to Henry Weld Fuller	56	31
Cross interrogatories to Henry Weld Fuller	68	37
Interrogatories to Marshall S. Perry	58	32
Crosa interrogatories to Marshall S. Perry	69	38
Interrogatories to Horatio Adams	59	33
Cross interrogatories to Horatio Adams	70	38
Defendants' exceptions to interrogatories	61	34
Deposition of Lewis Kirk	71	39
Exhibit A, referred to in Kirk's deposition	75	41
Deposition of Horatio Adams	77	42
Deposition of Marshal S. Perry	79	44
Deposition of Joshua Tucker	81	45
Deposition of Richard E. Palmer	83	46
Deposition of Henry Weld Fuller	86	47
Deposition of P. P. F. Degraad	88	49
Deposition of John E. Thayer	90	50
Assignment of errors	92	51

Writ of error.

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the honorable judges of the circuit court of the United States, for the eastern district of Pennsylvania, greeting:

Because in the record and proceedings of a plea which is in the said circuit court before you, between Elias H. Derby, a citizen of Massachusetts, &c., plaintiff, and the Philadelphia and Reading Railroad Company, citizens of Pennsylvania, defendants, No. 8, October session, 1849, of said court, and in the proceedings thereupon, particularly in the charge of the court, a manifest error hath happened, to the great damage of the said Philadelphia and Reading Railroad Company, as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties in this behalf, do command you, if a decree be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court, this thirteenth day of June, in the year of our Lord one thousand eight hundred and fifty-one.

GEORGE PLITT,
Clerk of the circuit court of the United States,
Eastern district of Pennsylvania.

(Allowed by) J. K. KANE, *U. S. Judge.*

UNITED STATES OF AMERICA,
Eastern district of Pennsylvania, ss.

In obedience to the foregoing writ, I herewith transmit to the Supreme Court of the United States, a full and complete transcript of the record and proceedings of the circuit court of the United States, for the eastern district of Pennsylvania, in the third circuit, in a certain suit therein determined in favor of Elias H. Derby, a citizen of the

State of Massachusetts, plaintiff, against the Philadelphia and Reading Railroad Company, citizens of the State of Pennsylvania, defendants.

[SEAL.] Witness my hand and the seal of the said court, at Philadelphia, this first day of December, A. D. 1851, and in the seventy-sixth year of the independence of the said United States.

GEORGE PLITT,
Clerk of said court.

Citation.

The United States of America to Elias Hasket Derby, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the eastern district of Pennsylvania, wherein the Philadelphia and Reading Railroad Company are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John K. Kane, a judge of the circuit court of the United States, for the third circuit, this thirteenth day of June, A. D. one thousand eight hundred and fifty-one.

J. K. KANE,
U. S. Judge.

Acceptance of service of citation.

I accept service of the within citation for Elias H. Derby.

HORACE BINNEY, JR.

June 13, 1851.

Pleas before the honorable the judges of the circuit court of the United States, for the eastern district of Pennsylvania, in the third circuit, of October session, 1848, No. 8.

It is thus contained:

Declaration.

The Philadelphia and Reading Railroad Company, citizens of the State of Pennsylvania, a body politic and corporate, duly incorporated under the law of the State of Pennsylvania, were attached to answer Elias H. Derby, a citizen of the State of Massachusetts, of a plea of trespass on the case, &c.

And thereupon the said Elias H. Derby, by Ferdinand W. Hubbell and Horace Binney, junior, his attorneys, complains: For that whereas

the said defendants heretofore, to wit, on the fifteenth day of June, A. D. 1848, were the owners of a certain railroad, to wit, the Philadelphia and Reading railroad, to wit, at the district aforesaid, and were then and there possessed of a certain car-engine called the Ariel, used by them in the transportation and conveyance of persons over and along the said road; and the said defendants, on the day and year aforesaid, received the plaintiff into their said car-engine Ariel, to be safely and securely carried and conveyed therein upon, over, and along the said railroad; and by reason thereof it became and was the duty of the defendants to use due and proper care that the said plaintiff should be safely and securely carried and conveyed upon, over, and along the said railroad as aforesaid; yet the said defendants, not regarding their duty in that behalf, did not nor would use due and proper care that the said plaintiff should be safely and securely carried and conveyed as aforesaid, upon, over, and along the said railroad; but then and there conducted themselves, by their servants, so negligently, carelessly, unskilfully, and improperly, that by reason of the said negligence, carelessness, unskilfulness, and improper conduct of the defendants, by their servants, afterwards, and while the said car-engine was proceeding with the said plaintiff therein over and along the said railroad, to wit, on the day and year last aforesaid, at the district aforesaid, he, the said plaintiff, was precipitated from the said car-engine upon the ground, and was thereby greatly injured; his jaw being thereby broken, his check bone fractured and indented, his teeth broken and injured, the muscles and nerves of his face, chest, and right arm lacerated, his right arm itself crippled, and the said plaintiff lacerated, hurt, and wounded, whereby the plaintiff became and was sick, sore, lame, and disordered, and so remained from thence hitherto. During all which time the said plaintiff suffered great pain and anguish; and thereby the said plaintiff during all that time was hindered and prevented from carrying on and transacting his necessary and lawful affairs and business, and in consequence thereof lost and was deprived of divers gains and profits, which otherwise might and would have accrued to him; and thereby, also, the plaintiff was necessarily subjected to and incurred divers expenses, to wit, the amount of five thousand dollars, in endeavoring to be cured of the said wounds, injuries, sickness, soreness, lameness, and disorder incidental thereto; and to great and extraordinary expenses in travelling, and otherwise, and was and is otherwise damnified, to wit, at the district aforesaid.

And whereas, also, the said defendants, afterwards, to wit, on the fifteenth day of June, A. D. 1848, were the owners of a certain railroad, to wit, the Philadelphia and Reading railroad, to wit, at the district aforesaid, and were then and there possessed of a certain other car-engine called the Ariel, used by them in the transportation and conveyance of persons over and along the said road; and were also possessed of a locomotive engine called the Lycoming, used upon the said railroad by the said defendants in transportation. And the said defendants, on the day and year aforesaid, received the plaintiff into their said other car-engine Ariel, to be safely and securely carried and conveyed

therein upon, over, and along the said railroad; and by reason thereof it became and was the duty of the defendants to use due and proper care that the said plaintiff should be safely and securely carried and conveyed upon, over, and along the said railroad as aforesaid; yet the said defendants, not regarding their duty in that behalf, did not nor would use due and proper care that the said plaintiff should be safely and securely carried and conveyed as aforesaid, upon, over, and along the said railroad; but then and there conducted themselves, by their servants, so negligently, carelessly, unskilfully, and improperly, that by reason of the said negligence, carelessness, unskilfulness, and improper conduct of the defendants, by their servants, afterwards, and while the said other car-engine was proceeding, with the said plaintiff therein, over and along the said railroad, to wit, on the day and year last aforesaid, at the district last aforesaid, he, the said plaintiff, was then and there exposed to danger of his life from an impending collision of the said other car-engine with the said engine of the said defendants, called the Lycoming, then and there running in an opposite direction upon the same track of the said railroad, and then and there directed and managed by the said defendants, by their servants. And in order to avoid the said danger, and as a prudent precaution for the purpose of preserving his life, he, the said plaintiff, did, then and there, leap from the said other car-engine upon the ground, and was thereby greatly injured, his jaw being thereby broken, his cheek-bone fractured and indented, his teeth broken and injured, the muscles and nerves of his face, chest, and right arm lacerated, his right arm itself crippled, and the said plaintiff lacerated, hurt, and wounded, whereby the plaintiff became and was sick, sore, lame, and disordered, and so remained from thence hitherto. During all which time the said plaintiff suffered great pain and anguish; and thereby the said plaintiff, during all that time, was hindered and prevented from carrying on and transacting his necessary and lawful affairs and business, and, in consequence thereof, lost and was deprived of divers gains and profits which otherwise might and would have accrued to him; and thereby, also, the plaintiff was necessarily subjected to and incurred divers expenses, to wit, the amount of five thousand dollars, in endeavoring to be cured of the said wounds, injuries, sickness, soreness, lameness, and disorder incidental thereto, and to great and extraordinary expenses in travelling and otherwise, and was and is otherwise damnified, to wit, at the district aforesaid.

And whereas, also, the said defendants, afterwards, to wit, on the fifteenth day of June, A. D. 1848, were the owners of a certain railroad, to wit, the Philadelphia and Reading railroad, to wit, at the district aforesaid, and were, then and there, possessed of a certain other car-engine, called the Ariel, used by them in the transportation and conveyance of persons over and along said road; and were also possessed of a certain other locomotive engine, called the Lycoming, used upon the said railroad, by the said defendants, in transportation. And the said defendants, on the day and year aforesaid, received the plaintiff into their said other car-engine, Ariel, to be safely and securely car-

ried and conveyed therein, upon, over, and along the said railroad, and by reason thereof it became and was the duty of the defendants to use due and proper care that the said plaintiff should be safely and securely carried and conveyed upon, over, and along the said railroad as aforesaid; yet the said defendants, not regarding their duty in that behalf, did not nor would use due and proper care that the said plaintiff should be safely and securely carried and conveyed as aforesaid upon, over, and along the said railroad, but, then and there, conducted themselves, by their servants, so negligently, carelessly, unskilfully, and improperly, that, by reason of the said negligence, carelessness, unskilfulness, and improper conduct of the defendants, by their servants, afterwards, and while the said other car-engine was proceeding with the said plaintiff therein, over and along the said railroad, to wit, on the day and year last aforesaid, at the district last aforesaid, the said locomotive engine and car-engine last aforesaid, were, then and there, under the management and direction of the said defendants, by their servants, driven in opposite directions to each other upon the same track, whereby a collision became inevitable; and the said plaintiff was thereby, then and there, placed in such a position of peril and alarm, that in attempting to escape therefrom, he fell from the said other car-engine upon the track of the said railroad, and was thereby greatly injured, his jaw bone thereby broken, his cheek bone fractured and indented, his teeth broken and injured, the muscles and nerves of his face, chest, and right arm lacerated, his right arm itself crippled, and the said plaintiff lacerated, hurt, and wounded, whereby the plaintiff became and was sick, sore, lame, and disordered, and so remained from thence hitherto, during all which time the said plaintiff suffered great pain and anguish; and thereby the said plaintiff, during all that time, was hindered and prevented from carrying on and transacting his necessary and lawful affairs and business, and in consequence thereof lost and was deprived of divers gains and profits which otherwise might have accrued to him; and thereby, also, the plaintiff was necessarily subjected to and incurred divers expenses, to wit, the amount of five thousand dollars, in endeavoring to be cured of the said wounds, injuries, sickness, soreness, lameness, and disorder, incidental thereto, and to great and extraordinary expenses in travelling and otherwise, and was and is otherwise damnified, to wit, at the district aforesaid.

And whereas, also, the said defendants, afterwards, to wit, on the fifteenth day of June, A. D. 1848, were the owners of a certain railroad, to wit, the Philadelphia and Reading railroad, to wit, at the district aforesaid, and were possessed then and there of a certain other locomotive-engine and car-engine; of which said railroad, locomotive-engine, and car-engine, last aforesaid, the said defendants then and there had the management, care, and direction, by their servants. And the plaintiff, on the day and year aforesaid, by the leave and license of the defendants, was then and there upon the said railroad, in the said car-engine last aforesaid; yet the said defendants, not regarding their duty in this behalf, by their servants, so negligently, carelessly, and

unskilfully managed and behaved themselves in the premises, that the said locomotive-engine and car-engine last aforesaid, were then and there brought with great violence into collision with each other; and the said plaintiff, while endeavoring to avoid the said collision, and the danger then and there impending therefrom, fell from the said car-engine last aforesaid upon the track of the said railroad, and was thereby greatly injured; his jaw being thereby broken, his cheek bone fractured and indented, his teeth broken and injured, the muscles and nerves of his face, chest, and right arm lacerated, his right arm itself crippled, and the said plaintiff lacerated, hurt, and wounded, whereby the plaintiff became and was sick, sore, lame, and disordered, and so remained from thence hitherto; during all which time the said plaintiff suffered great pain and anguish; and thereby the said plaintiff, during all that time, was hindered and prevented from carrying on and transacting his necessary and lawful affairs and business, and, in consequence thereof, lost and was deprived of divers gains and profits which otherwise might and would have accrued to him; and thereby, also, the plaintiff was necessarily subjected to and incurred divers expenses, to wit, the amount of five thousand dollars, in endeavoring to be cured of the said wounds, injuries, sickness, soreness, lameness, and disorder incidental thereto, and to great and extraordinary expenses in travelling and otherwise, and was and is otherwise damnified, to wit, at the district aforesaid.

And whereas, also, the said defendants, afterwards, to wit, on the fifteenth day of June, A. D. 1848, were the owners of a certain railroad, to wit, the Philadelphia and Reading railroad, to wit, at the district aforesaid, and were possessed then and there of a certain other locomotive-engine and car-engine, of which said railroad, locomotive-engine, and car-engine last aforesaid, the said defendants then and there had the management, care, and direction, by their servants. And the plaintiff, on the day and year aforesaid, by the leave and license of the defendants, was then and there upon the said railroad, in the said car-engine last aforesaid; yet the said defendants, not regarding their duty in this behalf, by their servants, so negligently, carelessly, and unskilfully managed and behaved themselves in the premises, that the said locomotive-engine and car-engine last aforesaid, were then and there brought with great violence into collision with each other. And the said plaintiff, immediately before the said collision, and when the said collision was inevitable, and in order to avoid the said collision, and the danger then and there impending therefrom, as a prudent precaution for the purpose of self-preservation, to wit, on the day and year last aforesaid, at the district aforesaid, leaped from the said car-engine upon the ground, and was thereby greatly injured; his jaw being thereby broken, his cheek bone fractured and indented, his teeth broken and injured, the muscles and nerves of his face, chest, and right arm lacerated, his right arm itself crippled, and the said plaintiff lacerated, hurt, and wounded, whereby the plaintiff became and was sick, sore, lame, and disordered, and so remained from thence hitherto; during

all which time the said plaintiff suffered great pain and anguish; and thereby the said plaintiff, during all that time, was hindered and prevented from carrying on and transacting his necessary and lawful affairs and business; and, in consequence thereof, lost and was deprived of divers gains and profits which otherwise might and would have accrued to him; and thereby, also, the plaintiff was necessarily subjected to and incurred divers expenses, to wit, the amount of five thousand dollars, in endeavoring to be cured of the said wounds, injuries, sickness, soreness, lameness, and disorder, incidental thereto, and to great and extraordinary expenses in travelling, and otherwise; and was and is otherwise damnified, to wit, at the district aforesaid.

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And whereas, also, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants undertook to transport the said plaintiff, with due care and skill, in a certain other car-engine called the Ariel, upon, over, and along a certain railroad, to wit, the Philadelphia and Reading railroad, to wit, at the district aforesaid. And the said defendants then and there received the said plaintiff into the said other car-engine, and the said plaintiff then and there took passage in the said other car-engine, to be so transported therein as aforesaid, by the said defendants; and thereupon it then and there became and was the duty of the said defendants to use due and proper care that the said plaintiff should be safely and securely transported in the said other car-engine, upon, over, and along the said railroad; yet the said defendants, not regarding their duty in that behalf, did not nor

would use due and proper care that the said plaintiff should be safely and securely transported as aforesaid, but then and there, by their servants, so negligently, carelessly, and unskilfully managed the engines upon the said railroad, that afterwards, and while the said other car-engine was proceeding, with the said plaintiff therein, upon, over, and along the said railroad, to wit, on the day and year last aforesaid, at the district aforesaid, the said other car-engine Ariel, and another engine running in opposite directions upon the same track of the said railroad, were, on the said railroad, to wit, on the day and year aforesaid, at the district aforesaid, by and through the negligence, carelessness, and unskilfulness of the said defendants, by their servants, brought with great violence into collision with each other; and after the said other car-engine Ariel had been abandoned by her engineer and fireman, and such collision was inevitable, the said plaintiff, while endeavoring to avoid impending danger and death, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, was precipitated from the said car-engine upon the track of the said railroad, and was thereby greatly injured; his jaw being thereby broken, his cheek bone fractured and indented, his teeth broken and injured, the muscles and nerves of his face, chest, and right arm lacerated, his right arm itself crippled, and the said plaintiff lacerated, hurt, and wounded, whereby the plaintiff became and was sick, sore, lame, and disordered, and so remained from thence hitherto. During all which time the said plaintiff suffered great pain and anguish; and thereby the said plaintiff, during all that time, was hindered and prevented from carrying on and transacting his necessary and lawful affairs and business, and, in consequence thereof, lost and was deprived of divers gains and profits which otherwise might and would have accrued to him; and thereby, also, the plaintiff was necessarily subjected to and incurred divers expenses, to wit, the amount of five thousand dollars, in endeavoring to be cured of the said wounds, injuries, sickness, soreness, lameness, and disorder incidental thereto, and to great and extraordinary expenses in travelling and otherwise; and was and is otherwise damnified, to wit, at the district aforesaid.

And whereas, also, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants undertook to transport the said plaintiff with due care and skill, in a certain other car-engine, called the Ariel, upon, over, and along a certain railroad, to wit, the Philadelphia and Reading railroad, to wit, at the district aforesaid. And the said defendants then and there received the said plaintiff into the said other car-engine.

And the said plaintiff then and there took passage in the said other car-engine to be so transported therein as aforesaid, by the said defendants; and thereupon it then and there became and was the duty of the said defendants to use due and proper care that the said plaintiff should be safely and securely transported in the said other car-engine, upon, over, and along the said railroad: yet the said defendants, not regarding their duty in that behalf, did not nor would use due and proper

care that the said plaintiff should be safely and securely transported as aforesaid; but then and there, by their servants, so negligently, carelessly, and unskilfully managed the engines upon the said railroad, that afterwards, and while the said other car-engine was proceeding with the said plaintiff therein, upon, over, and along the said railroad, to wit, on the day and year last aforesaid, at the district aforesaid, the said other car-engine, Ariel, and another engine running in opposite directions upon the same track of the said railroad, were, on the said railroad, to wit, on the day and year aforesaid, at the district aforesaid, by and through the negligence, carelessness and unskilfulness of the said defendants, by their servants, brought with great violence into collision with each other; and after the said other car-engine Ariel, had been abandoned by her engineer and fireman, and such collision was inevitable, the said plaintiff, while endeavoring to avoid being crushed to death by the said car-engine and other engine last aforesaid, a danger to which the said plaintiff was exposed by and through the negligent, careless, and unskilful management of the said car-engine and other engine last aforesaid, by the said defendants, was greatly agitated and disturbed by the said danger, and in consequence thereof fell from the said car-engine, striking his head, shoulder, and side upon said railroad, and was thereby greatly injured; his jaw being thereby broken, his cheek bone fractured and indented, his teeth broken and injured, the muscles and nerves of his face, chest, and right arm lacerated, his right arm itself crippled, and the said plaintiff lacerated, hurt, and wounded, whereby the plaintiff became and was sick, sore, lame, and disordered, and so remained from thence hitherto. During all which time the said plaintiff suffered great pain and anguish; and thereby the said plaintiff during all that time was hindered and prevented from carrying on and transacting his necessary and lawful affairs and business, and in consequence thereof lost and was deprived of divers gains and profits which otherwise might and would have accrued to him; and thereby, also, the plaintiff was necessarily subjected to and incurred divers expenses, to wit, the amount of five thousand dollars in endeavoring to be cured of the said wounds, injuries, sickness, soreness, lameness, and disorder, incidental thereto, and to great and extraordinary expenses in travelling and otherwise, and was and is otherwise damnified, to wit, at the district aforesaid.

And whereas, also, afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, the said defendants undertook to transport the said plaintiff with due care and skill, in a certain other car-engine, called the Ariel, upon, over, and along a certain railroad, to wit, the Philadelphia and Reading railroad, to wit, at the district aforesaid. And the said defendants then and there received the said plaintiff into the said other car-engine. And the said plaintiff then and there took passage in the said other car-engine, to be so transported therein as aforesaid, by the said defendants; and thereupon it then and there became and was the duty of the said defendants to use due and proper care that the said plaintiff should be safely and securely transported in

the said other car-engine, upon, over, and along the said railroad; yet the said defendants, not regarding their duty in that behalf, did not nor would use due and proper care that the said plaintiff should be safely and securely transported as aforesaid; but then and there, by their servants, so negligently, carelessly and unskilfully managed the engines upon the said railroad, that afterwards, and while the said other car-engine was proceeding with the said plaintiff therein, upon, over, and along the said railroad, to wit, on the day and year last aforesaid, at the district aforesaid, the said other car-engine Ariel, and another engine running in opposite directions upon the same track of the said railroad, under the management and direction of the said defendants, by their servants, were, on the said railroad, to wit, on the day and year aforesaid, at the district aforesaid, by and through the negligence, carelessness, and unskilfulness of the said defendants, by their servants, brought with great violence into collision with each other; and after the said other car-engine Ariel had been abandoned by her engineer and fireman, and such collision was inevitable, the said plaintiff, while endeavoring to avoid impending danger and death, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, as a prudent precaution for the preservation of his life, sprang from the said car-engine, towards the ground, and, in consequence of so doing, fell upon the said road, and was thereby greatly injured; his jaw being thereby broken, his cheek bone fractured and indented, his teeth broken and injured, the muscles and nerves of his face, chest, and right arm lacerated, his right arm itself crippled, and the said plaintiff lacerated, hurt, and wounded, whereby the plaintiff became, and was sick, sore, lame, and disordered, and so remained from thence hitherto; during all which time the said plaintiff suffered great pain and anguish; and thereby the said plaintiff, during all that time, was hindered and prevented from carrying on and transacting his necessary and lawful affairs and business, and in consequence thereof lost, and was deprived of, divers gains and profits which otherwise might and would have accrued to him; and thereby, also, the plaintiff was necessarily subjected to, and incurred divers expenses, to wit, the amount of five thousand dollars, in endeavoring to be cured of the said wounds, injuries, sickness, soreness, lameness, and disorder incidental thereto, and to great and extraordinary expenses in travelling and otherwise; and was and is otherwise damnified, to wit, at the district aforesaid.

Wherefore the said plaintiff saith that he is injured, and hath sustained damage to the amount of fifteen thousand dollars; and therefore he brings his suit, &c.

Plea of defendants.

And thereupon the said defendants, by their attorneys, St. George T. Campbell and S. G. Fisher, esquires, come and defend the force and injury, &c., and say, that they are in no wise guilty of the trespass aforesaid, as the said plaintiff hath alleged against them; and of

this they put themselves upon the country, &c.; and the said plaintiff doth the like.

Jury.

Therefore let a jury thereupon come before the judges aforesaid, at Philadelphia aforesaid, on the eleventh day of October, anno domini one thousand eight hundred and fifty, by whom, &c., who neither, &c., to recognise, &c., because as well, &c.

On which said eleventh day of October, A. D. 1850, come the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury aforesaid being called, likewise come; and further day is given to the parties aforesaid, until the seventh day of April, anno domini one thousand eight hundred and fifty-one.

Therefore, as before, let a jury thereupon come before the judges aforesaid, at Philadelphia aforesaid, on the seventh day of April aforesaid, by whom, &c., who neither, &c., to recognise, &c., because as well, &c.

On which said seventh day of April, A. D. 1851, come the parties aforesaid, by their attorneys aforesaid, and the jurors of the jury aforesaid being called, likewise come, to wit: Lucien F. Melsheimer, Patrick McBride, John Marshall, Frederick Sawber, Benjamin Newlin, Thomas Carson, Joshua Bethel, Christian Gleim, John McClure, Samuel Hannum, jr., James Murray, and Thomas K. Bull, who are duly empannelled, returned, chosen, tried, and sworn or affirmed to speak the truth of the matter within contained.

Bill of exceptions.

Be it remember, that in the October session, A. D. 1849, came Elias Hasket Derby, a citizen of the State of Massachusetts, into the circuit court of the United States, for the eastern district of Pennsylvania, and impleaded the Philadelphia and Reading Railroad Company, citizens of the State of Pennsylvania, in a certain plea of trespass on the case, &c., in which the said plaintiff declared, (prout narr.,) and the said defendants pleaded, (prout pleas;) and thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the city of Philadelphia, before the honorable Robert C. Grier, associate justice of the Supreme Court of the United States, on Tuesday, the twenty-second day of April, A. D. 1851, the aforesaid issue between the said parties came to be tried by a jury of the said district, for that purpose duly empannelled, (prout list of jurors;) at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid empannelled to try the said issues, being also called, came, and were then and there in due manner chosen and sworn or affirmed to try the said issue; and upon the trial the counsel of the said plaintiff called as a witness Josiah J. Rieff, who testified: That he had been in the employment of the defendants since

August, 1844; is at present chief clerk in the superintendent's office at Reading; that he was paymaster in June, 1848; remember the accident of June, 1848; on the 15th or 16th of that month made a trip in the "Ariel" up the road; left Reading at noon; was accompanied by Mr. Tucker, the president of the road, by the plaintiff, the engineer, Edwards, and the fireman, Fox; had business up the road with Mr. Nicolls, who was engaged in erecting a temporary crossing over the river Schuylkill, where a bridge had been burnt that morning or the evening before; did not stop, after leaving Reading, till we reached Port Clinton, a distance of twenty-two miles; took in wood and water there; knew the bridge was burnt when we started. After leaving Port Clinton, passed on three miles, and then, while passing round a curve, came in collision with the "Lycoming" engine belonging to the company, and coming on the same track; she had no train—only a tender; she was about one hundred yards off when first discovered; Mr. Tucker, just before we discovered her, was on the middle seat, I on the right hand side of the engine back; Mr. Derby was on the left hand side, near the front, in the corner; the unoccupied track was on our left; at the time saw the engineer of the "Ariel" standing on the break; from the checking of the speed supposed he had reversed the engine; when I saw a collision likely, I passed over to the tank, laid down on it, and grasped the railing; I should judge we all saw the Lycoming at the same moment, and had all risen from our seats; don't remember hearing the whistle; when I got into the tender, and the engines had approached each other within 30 feet, looked forward and saw Derby with his feet on the seat, or his knees on the back, where he had been sitting; saw no more of him till I went to him lying on the track after the collision; the moment they struck, I was thrown by the shock down on the foot-board, holding hard as I could; after the shock, got down on the back from the tender; our engine was moving ahead; can't say whether the "Lycoming" was stopped or not; the bumper of our engine was bruised and mashed; it is of iron, $\frac{3}{8}$ of an inch thick; observed no injury done to the tender; both engines remained on the track; saw Mr. Derby on the track, in the rear of the tender, fifteen feet, his head on one of the rails of the left hand track, his feet on the other, his body and legs slanting across the track we had just passed over; blood was coming from his mouth and nose; showed signs of life, by choking from blood in his throat; men from the other engine assisted to carry him across, on the side next the river; didn't see Mr. Tucker till after I passed into tender; didn't see him or Edwards leave the engine; I saw the fireman reeling as if recovering from impetus. After Mr. Derby had been carried away, went up to the burnt bridge to inform Mr. Nicolls of the accident; went part of the way on the "Lycoming," which, going back, overtook me; did not tell Mr. Nicolls myself—one of the men did; Mr. Nicolls came down to the place of the accident; Mr. Derby had been carried to a farm-house, and was sitting on a chair; he looked very pale, and complained that something was the matter with his jaw; went with him part of the way to Reading; stop-

ed at Port Clinton to telegraph Mrs. Nicholls to have a carriage and physicians ready when Mr. Derby should arrive. At the time of the collision, the "Ariel" had passed one-half or two-thirds of the distance which was between her and the "Lycoming" when the "Lycoming" was first discovered. The "Ariel" was made almost exclusively of iron; the roof was of wood; cushions on seats and back. We were on the proper track because of the bridge having been burnt; a single tract was then used, of necessity; J. P. Jones was the conductor of the "Lycoming" at the time; he was in the company's employ; after the accident, Mr. Tucker walked to me and asked me if Mr. Derby was killed; I think the "Ariel" could have run back after the injury; she was towed to Reading after the injury; the "Lycoming" did run back; bumper of "Ariel" only injured; was towed to Reading; have often before ridden on the "Ariel;" two or three times a month; she had been two or three years on the road; the president of the company often used her; she belonged to the company; she was at his disposal whenever he wished. The part of the "Ariel" occupied by passengers was uninjured, and, I believe, if they had remained, there would have been no injury to them. Saw Mr. Derby the day he started from Reading; his jaw was bandaged; he was sitting up.

Cross examined by counsel for defendants.

It is six miles from Port Clinton to the burnt bridge; about two and a half to where the accident happened; the bridge was burnt the night before, or the same morning early; the burning put an end to the coal trade and to freight; the left hand track was occupied by cars that had been stopped on their way up by the burning of the bridge; they were waiting till the temporary structure was finished across the river; this was done in forty-eight hours after the bridge was burnt; at Fort Clinton we were thus compelled to cross to the right hand track; the passenger train that morning had gone up that same track half an hour before us; at the burnt bridge passengers crossed on foot, and took another train on the opposite side; at the time of the collision we were turning a curve to the left; were going from eight to ten miles an hour round the curve; to stand on the break is to press it against the wheel; know[n] Jones, the conductor of the "Lycoming," for some time; he is a good, competent man; the engineer is under the control of the conductor; he is controller or captain of the engine; the bumper of the "Lycoming" was slightly bent; did not see the engineer of the "Lycoming" leave his engine; Jones, the conductor, was with the "Lycoming;" no one else who jumped from the "Ariel" was injured.

Re-examined by plaintiff's counsel.

The ground on the right of the "Ariel" was as wide as that table, before it slopes towards the river, at the place of the accident. The slope is not covered with stone. The "Ariel" was ordered out by Mr. Tucker. He could have stopped her at any place.

The counsel for the plaintiff then read the deposition of Lewis Kirk, (prout deposition,) omitting the parts of answers to the 6th, 10th, 11th, and 12th interrogatories, as marked, the same having been objected to by the counsel for the defendants, and the objections sustained by the court.

The counsel for the plaintiff then read the deposition of Horatio Adams, (prout deposition,) and of Marshall S. Perry, (prout deposition.)

The counsel for the plaintiff then called as a witness George W. Norris, who said:

I am a surgeon in Philadelphia, and have been for nearly twenty years. I attended the plaintiff, at the house of John Tucker, in this city. He had a fracture of the lower jaw, and complained of contusions he had received on the shoulder and forehead. I did not set his jaw; it had been set before he came to town. He complained very much; but I judged him to be a very nervous man, who would complain a great deal without much pain. I think he told me he had some false teeth knocked out. Whilst he was at Mr. Tucker's house I dressed his jaw; possibly every day. The deltoid muscle occupies a space at the top of the shoulder, and its use is to raise the arm. An injury to that muscle interferes with the use of the arm for a time—sometimes permanently. I presume I examined his deltoid muscle; don't recollect; do not remember applying a remedy to any part of his body except the jaw. Visited him a short time. Every man, going to a sick room, can make his mind up as to the character of his patient. The shock of falling from a car would be likely to derange the nervous system for a time; but it would be recovered from before the patient would be able to travel.

Cross examined by defendants' counsel.

I knew when he left town, and acquiesced in his going.

The counsel for the plaintiff then called Benjamin T. Seward as a witness, to prove that the reversing an engine passing around a curve is calculated to produce oscillation of the car, and putting down the break to produce disturbance of the motion.

Which testimony was objected to by the counsel for the defendants, and admitted by the court.

The witness being examined by the counsel for the plaintiff, then said:

I have been an engineer for four years, in the employ of the Camden and Amboy Railroad Company. It is my regular business to drive a locomotive. The engine will not run as steadily round a curve. Putting down the break produces a jog; reversing the engine a greater one; neither the break nor reversing will stop it instantly. In reversing the engine, she will roll if top-heavy. Old English engines will not roll or wabble so much. An engine never goes so steadily round a curve as on a straight line.

Cross examined by counsel for defendants.

Engines with inside connexions, wabble less around a curve than with outside. Wabbling means striking the rails on each side. Engiees will wabble some on a straight line. Wheels do not always slip on reversal; they may slip a little.

Re-examined by counsel for plaintiffs.

If the track is wet, the engine will slip. On reversal, engine goes one way and wheels go backward. This is not what we call slipping; I mean by slipping when wheels go fast round on bad rails. Slipping is when the wheels turn without catching the rail.

The counsel for plaintiff then called G. W. Smith, to whom the same objection as to the previous witness was taken by the counsel for the plaintiff, and whose testimony was admitted by the court. The witness said:

I was one of the founders of the Franklin Institute. The effect of the break or reversal on a straight line must prevent the motion on the straight line. The oscillation is much greater when going round a curve; the oscillation is always great round a curve, but much greater when the engine is reversed or the break applied.

Cross examined.

Speed affects the degree of oscillation very much.

The counsel for plaintiff then read the deposition of Joshua Tucker, (prout deposition.)

The counsel for plaintiff then read the deposition of Richard Palmer, (prout deposition.)

The counsel for plaintiff then offered to read the deposition of Henry Weld Fuller.

This was objected to by the counsel for the defendants, on the ground that it is given to prove special damage to his profession, whereas there is no averment of special damage in the declaration.

The evidence was rejected by the court, so far as relates to special damage.

The answer to the second interrogatory rejected.

To the third, admitted.

To the fourth, part in brackets rejected.

To the fifth, part in brackets rejected.

To the sixth, rejected.

The answers to the cross interrogatories were ruled out, except the fifth; and of the fifth, the part between brackets was rejected.

The counsel for plaintiff then offered the deposition of P. P. F. Dogrand, (prout deposition.)

To this the same objection as to the last deposition was taken, and sustained by the court.

The answer to the second interrogatory ruled out.

The part between brackets to the third.

To the fourth, ruled out.

To the sixth, ruled out.

To the second cross interrogatory, part between brackets ruled out.

The counsel for the plaintiff then offered the deposition of John E. Thayer—prout deposition—which was read, except the part between brackets, of the answer to the second interrogatory, which was ruled out by the court, on the same ground as above.

The counsel for plaintiff then called John J. Devereux, jr., as a witness, who said:

I have known Mr. Derby for twenty years. Have seen him frequently in Boston and here. He was a man of general good health and active habits; built for duration; a candidate for three score and ten. Saw him in June and November last.

(What was his condition then? To this the counsel for defendants objected, and the objection was overruled by the court.)

When I saw him in June, was struck by his appearance. He was awkward. In writing, he put his pen with his left hand into his right. There was an unnatural movement in his lower jaw.

The counsel for the plaintiff then offered, as a witness, John L. Andrews, who, being examined, said:

I reside in Boston; am the clerk of Mr. Derby; have known him seventeen years; his powers of endurance, before the accident, were good; he was an active, energetic man, enjoying good health; had entire command of his limbs, and was, physically, a perfect man; recollect the trip to Philadelphia, in June, 1848; received notice of the injury by telegraph. On the Monday following, escorted his wife to Philadelphia; saw him at Mr. Tucker's house; he was in a very sad condition; eye badly bruised; mouth and nose approximated; face crooked; disfigured to that extent I shouldn't have known him; should not have recognised him; remained two or three days; returned with him; had pillows and the easiest place in the car to New York; remained two days in New York at the house of his father-in-law; he was unable to go on at once to Boston; was much fatigued when he arrived in New York; went with him to Boston; remained in Boston one day; during that time he was very feeble; had medical attendance in New York; went from Boston to Newton, 8 miles; remained there until September; had a residence there; has since sold it. Ten or twelve days after he arrived, a fever set in; fever continued three weeks or more; got to its height in twenty days; his recovery very gradual; left his house as a well man, or a man able to attend to business, in October; was not a well man, but was able to attend to some business; a year afterwards was able to attend to business, but had not the strength he has now; he can't straighten his arm; can't lift it up; before the accident he had control of his right arm, not since; can't straighten it out; it has an unnatural motion; puts on his hat with the left hand; cants his body and throws his hat on; left hand does the duty of the right generally; he was not a left-handed man; in writing, shifts his pen

from right to left hand; puts pen in the ink, and returns it to right hand; didn't articulate so distinctly as before the accident; has a slight crook in his face; have seen once or twice the saliva oozing from his mouth, without his noticing it; think I can notice a decrease of physical energy; has grown gray fast; was sprinkled before; is not so robust as he was; before the accident, could endure as much fatigue as any one of his profession I ever knew; during the first year after the accident, his energies crippled; has since gradually regained them, but not to the same extent; retires early from his office, complaining of fatigue.

Cross examined by counsel for defendants.

He was attended at Newton by Dr. Adams, and, I believe, Dr. Perry; his age about forty-eight.

William B. Reed was then offered as a witness on the part of the plaintiff, and said:

I have known Mr. Derby a long time; saw him at Mr. Tucker's house after the accident; he appeared to be suffering a great deal; articulated with difficulty.

The counsel for the plaintiff then offered in evidence a correspondence between the parties, viz:

1. A letter from plaintiff to defendants, September 30, 1848.
2. " " " " February 5, 1849.
3. Answer to the two by defendants, February 16, 1849, as containing admissions of fact, and proving an offer, on the part of the plaintiff, to refer.

This evidence was objected to, on the part of the defendants, as not relating to the points at issue, viz., the negligence of the defendants, and the amount of damages. The objection was sustained by the court, and it was ruled out.

The plaintiff then offered in evidence the charter of the defendants, and particulary sections 9 and 20.

(*Act of Assembly, of April* 4, 1833, *pamph. laws, p.* 150.)

SEC. 9. And be it further enacted by the authority aforesaid, That the president and managers of the said company shall demand and require of and from the treasurer, and may demand and require of and from all and every other the officers and other persons by them employed, bond and sufficient penalties, and with such securities as the said company shall, by their rules, orders, and regulations, require for a faithful discharge of the several duties and trusts to them respectively committed.

SEC. 20. And be it further enacted by the authority aforesaid, That it shall, and may, be lawful for the president and managers, from time to time, to ordain and establish rules and regulations for the due ordering of all travelling and transportation on the said road, and for its pre-

servation, with power to alter, repeal, enlarge, or amend the said rules and regulations, as they may deem expedient; and that they shall have full power and authority to prescribe the kinds and descriptions of cars, carriages, or wagons to be used on the said road for the conveyance of passengers, and the transportation of the mails, or of goods, wares, merchandise, and minerals, and to regulate the speed at which they shall travel, and to adopt and enforce such rules and regulations, in relation to the transit thereof, as they may deem expedient: Provided, That the toll on any species of property shall not exceed an average of four cents per ton per mile, nor upon each passenger an average of two cents per mile.

The evidence for the plaintiff here closed.

The counsel for defendants then called as a witness, Allen Ellison, who said:

I was engineer of the Lycoming engine in June, 1848. The accident happened June 15, about three miles above Port Clinton; it was at a curve; was going very slow, about three miles an hour, when I first saw the "Ariel" approach, as I had just shut off steam to let a man out; soon as I spied her, reversed right away. The "Ariel" was about one hundred yards off; I remained on the engine; when I reversed, I pulled open the valve on the back action; wheels commenced turning, and I was going backwards when struck by the "Ariel;" could have got out of the way in a minute or two. Saw Mr. Tucker and Mr. Derby in the "Ariel;" saw Mr. Tucker get out of the front and come down on his hands and knees; saw Mr. Derby come out of the side between the two columns and fall. My engine not injured to prevent her running; bumper of the "Ariel" was bent up. After the collision went back to the burnt bridge, got a car, and then went to Reading. Jones had ordered me to go up and get some men to load wood; had been up, got the men, and was coming down with them. The passenger train had passed up; the collision happened half an hour after; Jones was with me on the engine; he had been in the employ of the company for some time.

Cross examined by counsel for plaintiff.

I remained on the "Lycoming" until the collision; the other men were on the engine till I stopped; there were ten or eleven on; no one jumped till after the collision. An engine going three miles an hour, could be stopped a good deal inside of a minute; she would not go much over fifty feet; stopped the engine to put out a man to go ahead, and run round the curve to see if any thing was coming; always send some one to look ahead, in running a curve on a single track; no one got off, as at the time I saw the "Ariel" coming, I had not reached the curve; was then in the act of stopping to let one go ahead, as I was just entering the curve. About the time of entering the curve, we generally send a man ahead. It is the conductor's business to give orders about this;

had not given an order that I know of; saw the "Ariel" just as I was stopping to send a man ahead; was going to a wood siding between Port Clinton and the burnt bridge; was to carry the wood to Reading; had come from Reading up, and was then going back. Jones and I knew we were to use only one track, the bridge having been burnt. I had gone to Reading for wood for engines; the burnt bridge was repaired in about two days; did not see any one jump from the "Lycoming;" the fireman was by my side, and he staid.

The counsel for defendants then called as a witness James Edwards, who said:

I have been seven years in the employment of the company, part of the time as machinist, part as engineer; have driven the "Ariel" four years; recollect the accident. Messrs. Derby and Tucker got into the "Ariel" at Reading. The freight trains had been stopped by the burning of the bridge. Went to Port Clinton, and stopped there for wood and water. On the day of the accident, by order of Mr. Tucker, prepared the "Ariel," and in about fifteen minutes after the passenger train started, proceeded up the road; stopped at Port Clinton for wood and water; there received notice from the despatcher to take the track next the river to the burnt bridge, and make all haste that I possibly could to that point, as nothing could come down till I got up. After leaving Port Clinton three miles off, going round a heavy curve, having entered the curve some distance, the whole party spied another engine coming; were going ten, twelve, perhaps fifteen miles an hour; immediately tried to stop my engine, by reversing and putting down the break. Whilst doing this, some of the parties availed themselves of the opportunity, and left the engine. Mr. Tucker and the fireman jumped about the same time, the lad first. I remained on the engine using all efforts to stop her, till I found I could produce no further effect, and when I saw that I could do no more, and the collision inevitable, the engines being nearly together, I made an effort to jump and did so; fell on my hands and knees; did not jump judiciously; ought to have jumped in the direction of the motion; I jumped across it; saw Mr. Derby lying on the track; before I jumped, saw Mr. Derby standing in the "Ariel" near where he had been sitting.

Cross examined.

I have said that I was going thirty miles an hour, but not at that time; to my recollection at present I never said I was running thirty miles an hour; won't say positively that I was not running thirty miles, but my opinion is I was running ten, twelve, or fifteen miles; do not think the engine was going over fifteen miles; never did state, to my knowledge, that I was going thirty miles; can't undertake to say how Mr. Derby got out; saw him perched on the side; reversing the engine produced no jar of any account.

Re-examined.

We always run curves more slowly; was examined as a witness on behalf of plaintiff; when I fell saw a man lying on the ground; went to a farm house to get assistance; first saw the "Lycoming" on a curve some fifteen or twenty feet from upper end of the curve; the embankment was stony.

The counsel for defendants then offered as witness George Fox, who said:

Am employed by the company in a machine shop at Reading; in June, 1848, was fireman on the "Ariel;" June 15, 1848, we had the right hand track up to Port Clinton; had orders there to cross and take the track next the river to the burnt bridge, and that nothing was to come down till we got up; Burns gave the order; went on about three miles above Port Clinton; put a fire in just as I came to the curve; was standing on the step looking ahead; saw the "Lycoming" approach; was about one hundred yards off; saw first the top of the smoke stack; staid till I saw the bumper and fire-box; quick as I seen her I said nothing, only I jumped; I jumped the way the engine was going on a bank, with such force that my elbows and face went into the mud; the engines, when I looked around, were near together; saw Mr. Tucker tumbling about on his hands and feet, and he fell into gutter; Mr. Edwards jumped out and laid on the track; saw Mr. Derby on his knees on the side of the car holding on to the bars; he let go his hold on the bars and fell out; the engine and tank passed him; he fell on his head and then canted over, and his legs lay as far as his knees on our track, about fifteen feet in the rear of the engine; noticed when I got on the engine again that it was full reversed, and think she could have gone back, but the wheels of the tender were off the track; we were going from fifteen to twenty miles when we first saw her; ten to twelve when we struck; could have gone on if we had had time to make some repairs; the machinery was not injured.

Cross examined.

Never measured the distance from where we saw the "Lycoming."

The counsel for defendants then offered as a witness Edward Burns, who said:

I was despatcher at Port Clinton in 1848; till the day of the accident always found Jones a careful and competent man; on the arrival of the "Lycoming" at Port Clinton saw him; he was in charge of her that day with a wood train; told him that all engines were prohibited from going up the road, after the passenger train went up, till the "Ariel" arrived; he said he would go; I told him he couldn't go; he said he would take the responsibility and go. These instructions were given in consequence of the "Ariel" being expected, and the other track being occupied by empty coal trains.

By a juror. Was Jones discharged for misconduct?

Defendants' counsel read the dismissal of Jones, dated June 20th, 1848.

Mr. J. P. JONES, *conductor wood train.*

SIR: In consequence of your violation of the rules of the road, and the disobedience of express orders left by Mr. Kirk at Port Clinton, on the 15th instant, thereby causing a collision on the road, resulting in a serious injury to a gentleman in company with President Tucker, and risking the life of the latter and others in the engine "Ariel," you are hereby dismissed from your station and the employ of the company.

Mr. John O. Mathews will take your place, and you will be settled with for your wages on application to the company's office at Reading.

Yours, &c.,

(Signed) G. N. NICOLLS,
Engineer, &c.

Reading, June 20, 1848.

James Mullholland was then sworn on the part of the defendants, and said:

Am a machinist in the employment of the defendants. As an engine goes round a curve the motion is much more steady, because the centrifugal force keeps the wheel against the rail; the flange hugs the rail.

F. P. Dimpfell was then examined on the part of the defendants, and said:

I am acquainted with locomotives. An engine is steadier when going round a curve; it will bind against the outside rail.

G. A. Nicolls was then sworn on the part of the defendants, and said:

The radius of the curve where the accident happened was between two and three hundred feet. Mr. Derby was at my house in Reading four or five days; two or three days after the collision he asked me for writing materials to write a report of the speech he had made at the meeting of the stockholders for the press; he read me the speech in the evening. An engine runs more steadily round a curve.

John L. Andrews was then recalled and examined in rebuttal on the part of the plaintiff. He said:

I saw James Edwards a year after the accident at Reading, in April, 1849. He told me that, at the time of the collision, the "Ariel" was running thirty miles an hour.

Cross examined.

I went to Reading to collect testimony for this suit.

Thereupon the counsel for the plaintiff requested the judge to charge the jury:

1. That if the plaintiff was lawfully upon the railroad of the defendants at the time of the collision by the license of the defendants,

and was then and there injured by the negligence or disobedience of orders of the company's servants, then and there employed upon the said railroad, the defendants are liable for the injury done to the plaintiff by such collision.

2. That if the defendants, by their servants, undertook to convey the plaintiff along the Reading railroad, in the car "Ariel," and while so conveying him, through the gross negligence of the servants of the company, then and there employed upon the said railroad, the collision occurred by which the plaintiff was injured, that the defendants are liable for the injury done to the plaintiff by such collision, although no compensation was to be paid to the company for such conveyance of the plaintiff.

3. That if the collision by which the plaintiff was injured was occasioned by the locomotive "Lycoming," then driven negligently or in disobedience of orders, upon the said road, by J. P. Jones, one of the company's servants, then having control or command of the said locomotive, that the defendants are liable for the injury to the plaintiff caused by such collision.

And thereupon the counsel for the defendants requested the court to charge the jury.

1. That the damages, if any are recoverable, are to be confined to the direct and immediate consequences of the injury sustained.

2. That if the jury believe the plaintiff had paid no fare, and was passing upon the railroad of the defendants as an invited guest, in order to entitle him to recover damages, he must prove gross negligence, which is the omission of that care which even the most thoughtless take of their own concerns.

3. That the defendants would be liable in damages to a passenger who had paid passage money, upon their contract to deliver him safely, for slight negligence; but to an invited guest who paid no fare or passage money, they will not be responsible, unless the jury believe that there was not even slight diligence on the part of the agents of the defendants.

4. That the employer is not responsible for the wilful act of his servant or agent.

5. That if the jury believe that the conductor of the engine "Lycoming," wilfully and against the express orders of the officer of the company communicated to him, by running his engine upon the track above Port Clinton, caused the collision, the defendants are not responsible for any injury or loss resulting from such wilful disobedience.

6. That if the jury believe that every reasonable and proper precaution was taken to have the track of the railroad clear for the passage of the "Ariel," and the collision ensued solely by reason of the wilful disobedience of the conductor of the "Lycoming," and of the express orders duly given by an agent of the company, the plaintiff cannot recover.

7. That if the jury believe that the conductor of the "Lycoming" and all the officers of the company, in any wise connected with the

collision, were carefully and prudently selected, and that the collision ensued and the injury resulted to the plaintiff, an invited guest, by the wilful disobedience of one of them to an order duly communicated, then the plaintiff cannot recover.

Judge Grier's charge to the jury.

Whereupon the learned judge charged the jury, as requested, on all the points offered by the plaintiff.

And the learned judge charged on the 1st and 2d points offered by the defendants as requested, and also on the 3d point of the defendants, with the explanation, that tho' all the other agents of the defendants acted with diligence, yet, if one of the agents used no diligence at all, then the defendants could not be said to have shown slight diligence.

As to the 4th point, the learned judge charged as requested by the defendants, with this explanation, that tho' the master is not liable for the wilful act of his servant, not done in the course of his employment as servant; yet, if the servant disobeys an order relating to his business, and injury result from that disobedience, the master is liable; for it is his duty to select servants who will obey. The disobedience in this case is the ipsa negligentia, for it is not pretended by the defendants that the "Lycoming" was intentionally driven against the "Ariel."

On the 5th, 6th, and 7th points of the defendants, the learned judge refused to charge as requested.

The learned judge further said that it is admitted that the plaintiff was injured through the act of Jones, the conductor of the "Lycoming;" that the plaintiff was lawfully on the road, by the license of the defendants; then, in this view of the case, whether he paid fare or not, or was the guest of the defendants, made no difference as to the law of the case.

And, thereupon, the counsel for the said defendants did, then and there, except to the aforesaid charge and opinion of the said court, as above set forth and stated; and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record the said counsel for the said defendants did, then and there, tender this bill of exceptions to the opinion of the said court, and requested the seals of the judges aforesaid should be put to the same, according to the form of the statute in such case made and provided. And, thereupon, the aforesaid judges, at the request of the said counsel for the defendants, did put their seals to this bill of exceptions, pursuant to the aforesaid statute in such case made and provided, this first day of December, A. D. 1851.

R. C. GRIER, [SEAL.]
J. K. KANE. [SEAL.]

Verdict of the jury.

And now, to wit, the jurors aforesaid, upon their oaths and affirmations aforesaid, respectively do say, that they find for the plaintiff, and assess the damages at three thousand dollars, with costs.

2192.

Motion for new trial.

Whereupon the said plaintiff, by his attorneys aforesaid, prays judgment upon the verdict aforesaid; and the said defendants, by their attorneys aforesaid, say that the court here ought not to render judgment of and upon the said verdict, and pray that judgment of and upon the said verdict may be stayed, because the same is insufficient and erroneous; and pray that the verdict aforesaid may be quashed, and that the issue aforesaid may be tried anew by other jurors, to be afresh empannelled; because—

The learned judge erred.

1. In admitting in evidence from the depositions taken under commission to Boston, the several matters objected to by the defendants.
2. In not charging the jury, as requested, in the points presented by the defendants.
3. In charging the jury, as requested by the plaintiff, in the points presented on his behalf.

New trial refused.

And thereupon, it is considered by the court here, that the motion in arrest of judgment be dismissed, and the new trial refused; and that the said plaintiff do recover against the said defendants as well the said sum of three thousand dollars, the amount of the verdict aforesaid, as also the sum of , for his costs and charges about his suit in that behalf expended, to the said plaintiff by the court here adjudged, &c.

Commission to Boston, and depositions taken under it.

[Referred to in the bill of exceptions.]

In the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit, of October session, 1849.

No. 8.

E. H. Derby, a citizen of the State of Massachusetts,
vs.
The Philadelphia and Reading Railroad Company, citizens of the State of Pennsylvania.

The President of the United States, to Charles Levi Woodbury, esq., Boston, Massachusetts.

Know ye, that, in confidence of your prudence and integrity, we have given unto you, and by these presents do give unto you, full

power and authority, in pursuance of a rule, lately made in the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit, in a certain action on the case therein depending, wherein the said E. H. Derby, a citizen of the State of Massachusetts, is the plaintiff, and the said Philadelphia and Reading Railroad Company, citizens of the State of Pennsylvania, are defendants, to call before you, at a certain day and place by you for that purpose to be appointed, all and every person and persons who may be named to you by the said plaintiff as witnesses in the said action, and then and there to examine them, on their respective oath or affirmation, on certain interrogatories hereunto annexed, touching the premises, and to reduce their testimony to writing; and when you shall have so done, you are to send the same to the said circuit court, closed up, and under your seals plainly and distinctly set, together with this writ.

[Seal of circuit court U. S., E. D., Penn.]

Witness the honorable Roger B. Taney, chief justice of Supreme Court of the United States, at Philadelphia, this twenty-fifth day of September, A. D. 1849, and in the seventy-fourth year of the independence of the said United States.

GEORGE PLITT,
Clerk of circuit court.

In the circuit court of the United States, for the eastern district of Pennsylvania, in the third circuit, of October session, 1849, No. 8.

E. H. Derby, a citizen of the State of Massachusetts,
vs.
The Philadelphia and Reading Railroad Company, citizens of the State of Pennsylvania.

Interrogatories to be proposed to Lewis Kirk, of the city of Cambridge, county of Middlesex, State of Massachusetts, engine builder, on the part of the plaintiff.

1st. State your name, residence, and occupation.

2d. Do you know the plaintiff in the title of these interrogatories named?

3d. Were you, or were you not, on the fifteenth of June, 1848, in the employ of the defendants, and in what capacity; had you on that day any business on the Philadelphia and Reading railroad, and did you pass up the same from Reading to the bridge near Orwigsburg?

4th. Did you or not see said Derby and the President of the Reading railroad, that morning, at Reading; and do you know whether or not they went up the railroad above Reading, in the engine car called the "Ariel;" and who, if any one, invited the said Derby to go in the said "Ariel?"

5th. Describe said "Ariel," and the car built on the same.

6th. Did or did not any collision occur between the "Ariel" and the engine "Lycoming" that morning; and, if aye, was or was not said Derby thereby injured, and to what extent; and where were you when such injury occurred; how far from the spot where it occurred; how were you first apprised of it; how soon were you on the ground; in what condition did you find said Derby? If you should state that he was at any time senseless, then state how long he contined so, and what was done with him; describe his condition and appearance.

7th. While said Derby was inanimate, if you should testify that at any time he was inanimate, state what was said and done by the President of the Reading railroad, respecting the collision.

8th. If you should testify that there was any collision, then state what was done with said Derby after the collision; did he or not raise any and what quantity of blood?

9th. Did you or not make to the defendants, or their President, any official report of the causes of the collision, and were you requested so to do, and by whom; and was such report correct? Examine the document now produced to you, marked A, purporting to be a report made by you to said company, who are defendants in the title of these interrogatories named, and state in whose handwriting all or any part thereof is, and whether it is what it purports to be.

10th. Was or was not either John P. Jones, named in said report, or his brother, authorized by any and what officers of said corporation to run engines on the Reading railroad, at their discretion, or otherwise; has any order to that effect been entered on the order book of said corporation?

11th. If you should testify that any collision took place, give all the particulars and causes of the collision, whether stated in your report or not.

12th. Would or would not the persons in the "Ariel," at the time of any collision of which you may testify, have encountered more danger by remaining thereon than by leaving the same; when engines come in collision, are the persons remaining thereon, or in the cars thereto attached, usually injured?

13th. Do you know any thing else material to the plaintiff? If so, state the same as particularly as if thereto directly interrogated.

FERDINAND W. HUBBELL,
Attorney for the plaintiff.

August 10, 1849.

A true copy from the original filed.

Interrogatories to be propounded on the part of the plaintiff to John E. Thayer, of Boston, Massachusetts, exchange broker.

1st. State your name, residence, and occupation.

2d. Have you at any time during the past twenty years known E. H. Derby, of said Boston, esquire; what is his standing in the profes-

sion, as an advocate of railroad cases; and was he or was he not engaged in a lucrative business to June, 1848?

3d. Did you or did you not request him to go to Philadelphia and represent any, and what interest, at the meeting of the Philadelphia and Reading Railroad Company; and did he or did he not go there for that purpose in June, 1847; did he or did he not attend such meeting with you in Philadelphia, on or about the 15th of June, 1848; was he or was he not then and there invited by the president of such company to go with him up the railroad; and did he or did he not sustain any injury thereon?

4th. Did you or not see said Derby after his return from Boston; did you or not ride out to his residence in the country, and in what condition did you find him; had he sustained any and what injuries, and was his nervous system at all affected by the injuries he had received?

5th. Do you hold any and what interest in said corporation?

FERDINAND W. HUBBELL,
Attorney for the plaintiff, August 10th, 1849.

Interrogatories to be proposed to P. P. F. Dogrand, of Boston, Massachusetts, stock broker, a witness to be examined on the part of the plaintiff, in the title of these interrogatories named.

1st. Please state your name, residence, and occupation; do you or not transact business in said Boston, and how long have you been established there?

2d. During the past ten years have you or not known the plaintiff in the title of these interrogatories named; what standing has he occupied as an advocate and in the direction of railroads, and has he or has he not been at all engaged in a lucrative business?

3d. Are you or are you not aware of the fact that he went to Philadelphia in June, 1848; if so, for what purpose did he go; what degree of health did he then enjoy; have you seen him since his return, and how often; and had he sustained any and what injury?

4th. If you state that said Derby has been injured to any extent during his absence from home in June, 1848, please state the amount of the injury, and what sum, if any, would indemnify the said Derby for the injuries sustained by him.

5th. Have you any interest in the bonds or stock of the Reading Railroad Company?

6th. Do you know any thing else material to the plaintiff in the title to these interrogatories named? If so, state the same as particularly as if thereto directly interrogated.

FERDINAND W. HUBBELL,
Attorney for plaintiff, August 10, 1849.

Interrogatories to be propounded to John L. Andrews, of Boston, in the county of Suffolk, and State of Massachusetts, clerk, a witness to be examined in behalf of the plaintiff in the title of these interrogatories named.

1st. State your name, age, residence, and occupation.

2d. Are you or not acquainted with the plaintiff in the title of these interrogatories named; have you or not been, and are you now, in his employ, and how long have you been so?

3d. How was the said Derby occupied prior to the 15th of June, A. D. 1848; was he or not engaged in any and what lucrative business, and to what extent was he employed?

4th. Was was or not the said Derby, prior to that period, able to endure fatigue, and conduct important and protracted cases as an advocate; in what description of cases was he engaged; who were his opponents, and what emoluments did he receive; and did he or not hold in addition any salaried office?

5th. Do you or not remember a trip made by said Derby to Philadelphia in June, 1848; did you or not hear from him while there, and did you or not thereupon go on and escort his wife to Philadelphia; and did you or not find said Derby there, and in what condition? State the particulars of your first interview with him there, and how he appeared, and who was in attendance.

6th. Did you or not accompany said Derby home; how did he travel, and when did he reach home; did he or not consult any surgeon or physician in Philadelphia and New York; and how many, if any, in Boston and its vicinity?

7th. Was or was not said Derby worse at all after his return to the eastward; did you or not see him at Newton; and in what condition did you find him; has his health or appearance suffered; what has been and is the condition of his arm, shoulder, and general health?

8th. Has or has not said Derby been able to make the same professional effort since as before the injury he sustained; if you should testify that he has sustained injury, is his health or appearance as robust; if you say that he still tries cases, does he or does he not try as many and with the same power?

9th. Do you know any thing else material to the plaintiff in the title to these interrogatories named; if so, state the same, particularly, as if thereto directly interrogated.

FERDINAND W. HUBBELL,
Attorney for plaintiff.

August 10, 1849.

Interrogatories to be proposed to Joshua Tucker, of Boston, in the county of Suffolk, and State of Massachusetts, dentist, a witness to be examined in behalf of the plaintiff in the title of these interrogatories named.

1st. State your name, age, residence, and occupation.

2d. Do you or do you not know the plaintiff, E. H. Derby, esquire, and have you or have you not, in past years, performed any and what operations on his teeth.

3d. Did you or did you not, in the latter part of the summer of 1848, examine his mouth, and did you or not discover any fracture and injury to his jaw; and, should you testify that you did, was or was not the same then entirely healed; did you or did you not subsequently prepare a set of upper teeth for him; was or was not the shape of his mouth the same as before the fracture; or had it altered; and was said Derby thereby subjected to any discomfit, inconvenience, and expense?

4th. Should you testify that you refitted his mouth, what was your bill for so doing?

5th. Do you know any thing else material to the plaintiff? If so, state the same as particularly as if thereto directly interrogated.

FERDINAND W. HUBBELL,
Attorney for plaintiff.

August 10, 1849.

Interrogatories to be proposed to Richard Palmer, of the city of Boston, waiter, a witness to be examined on the part of the plaintiff in the title of these interrogatories named.

1st. State your name, age, residence, and occupation.

2d. Whether or not did you, in the early part of the year 1848, live as a domestic in the family of E. Hasket Derby, the plaintiff in the title of these interrogatories named; did you or did you not, in May, 1848, remove with said family from the city of Boston, Massachusetts, to the country residence of said Derby at Newton; did you see him daily in the early part of June, 1848; and what was the condition of said Derby at such time, as respects health and activity; and what were his business habits; did or did not said Derby, during that year, start for Philadelphia; and if aye, at what time in that year?

3rd. Have you or not continued since to live in the family of said Derby; did you see said Derby on his return from Philadelphia; was he or not then at all altered or disfigured in his appearance from what it had been immediately before his going there; state to what extent; was he or not able to dress and undress himself, to eat, to carve, or to shave himself; describe the appearance of his eye, cheek, chest, mouth, and arm after his return from Philadelphia; and, should you mention any peculiar appearance, did it exhibit such appearance before he went to Philadelphia?

4th. Did or not said Derby require aid to dress and undress after his return from Philadelphia; (if you should testify that he made a visit to Philadelphia,) and if aye, who assisted him to dress and undress; and was he or not obliged to sleep on one side for any, and what length of time; were or not any medicines administered to him, and any applications made to his arm, and by whom; and have or not such applications been discontinued, or are they still made; to what extent has

said Derby recovered the use of his arm, (should you have testified that his arm was injured;) and has he or not, up to this time, been obliged to use any and what pullies and weights to improve the action of the same; and has he or not employed any and what surgeons and physicians?

5th. Did or did not said Derby suffer at all from pain in the summer of 1848, after his return from Philadelphia; did he or not suffer any confinement to the house, lose any flesh or strength, or become, to any extent, enfeebled; how much flesh, if any, did he lose; was or not his jaw bandaged, and whether or not he was unable to take any solid food?

6th. Did or did not said Derby have any relapse after his return from Philadelphia; was he or not, at any time, alarmingly ill, or in a precarious condition? If aye, state all the particulars.

7th. Has or has not said Derby, since he returned from Philadelphia, in the year 1848, been obliged to use tonics or any other medicine, and what; to confine himself to any particular kind of bread or other diet; and to live by rule, or to use any precautions as respects exposure?

8th. If you know anything else material to the plaintiff, please state the same as particularly as if thereto directly interrogated.

FERDINAND W. HUBBELL,
Attorney for plaintiff.

AUGUST 10, 1849.

Interrogatories to be proposed on behalf of the plaintiff in the title of these interrogatories named, to Henry Weld Fuller, of Roxbury, county of Norfolk, and State of Massachusetts, esquire.

1st. State your name, residence, occupation, and place of business.

2d. Were you acquainted with Elias Hasket Derby, of the city of Boston, esquire, the plaintiff in the title of these interrogatories named, prior to and subsequent to the 15th of June, 1848? If you answer in the affirmative, state what description of business he was engaged in, to what extent he was occupied, and what professional emoluments he received. If you state he was employed at all in railroad cases, state in what class of cases he was retained, how far he had the choice of cases, and who were his opponents?

3d. Prior to June 15, 1848, what was the state of his health, and what powers of endurance did he possess, and what amount of business did he accomplish?

4th. Do you or not know of his having made a journey to Philadelphia in June, 1848? If aye, how often have you seen him since his return from Philadelphia, in June, 1848; what was his condition when you first saw him after his return; has he been, and is he in any respect crippled or disfigured; were or were not his arm and shoulder and face to any and to what extent injured; and has or has not his nervous system been affected? If you state that he was to any extent crippled or injured, how far does such injury extend, and does it or not continue?

5th. If, during the past year, you have from day to day noticed said Derby, please state whether or not, and if aye, how far it is perceptible that he has received any injury; and whether or not his constitution and general health are to any, and what extent, impaired; and whether or not, and how far, his ability to conduct professional cases as an advocate is affected; and whether or not his powers are to any and what extent impaired?

6th. If you state that the powers of said Derby have been to any extent impaired, please state whether or not you have known of the trial of any cases on which trials the said Derby has broken down, and been compelled to decline speaking since such injury in consequence of physical weakness?

7th. If you know anything else material to the plaintiff, state the same as minutely as if thereto directly interrogated.

FERDINAND W. HUBBELL,
Attorney for plaintiff.

August 10, 1849.

Interrogatories to be proposed, in behalf of the plaintiff in the title of these interrogatories named, to Marshall S. Perry, of Boston, in the State of Massachusetts, physician.

1st. State your name, residence, and occupation, and how long, if at all, you have been established in said practice in Boston.

2d. Do you know Elias Hasket Derby, the plaintiff in the title of these interrogatories named, and how long have you known him; were you or not, on or about the 22d of June, 1848, called upon to visit him while on his way from Philadelphia, at Newton; if aye, in what condition did you find him; had he or not been injured? Describe the condition in which you found his right eye, right arm, side and shoulder, right cheek, cheek and jaw bone; and whether or not he exhibited any, and what indication of having sustained a severe shock.

3d. Did you or not, from time to time, afterwards, see the said Derby; if aye, were or were not his digestive powers and general health affected; and if aye, whether or not by injuries which he had sustained; and have you or not been obliged to prescribe to him any particular courses of diet and medicine?

4th. Has or has not his right shoulder been injured; has or has not the deltoid muscle of the shoulder sustained any and what injury; and have or have not the bones of his cheek and jaw been all injured or displaced?

5th. How serious have been the injuries, if any, sustained by said Derby, and how far have they affected, and will they affect, his general health?

6th. If you know any thing else material to the plaintiff, please state the same as particularly as if thereto directly interrogated.

FERDINAND W. HUBBELL,
Attorney for plaintiff.

August 10, 1849.

2106.

Interrogatories to be proposed to Horatio Adams, of Waltham, in the county of Middlesex, and State of Massachusetts, physician, a witness to be examined on the part of the plaintiff, in the title of these interrogatories named:

1st. State your name, residence, and occupation, and how long you have been engaged in business.

2d. Do you or not know E. H. Derby, the plaintiff in the title of these interrogatories named, and how long have you known him, and in what business has he been engaged?

3d. Did or did not the said Derby in June, 1848, reside near Waltham, in Newton; did he or not go to Philadelphia, and if aye, were you or not upon his return called upon to attend him professionally?

4th. If aye, at what time were you called upon to see him; in what condition did you find him? Describe the state of his right arm, shoulder, side, and cheek, also right eye. Were or were not the same bruised and discolored, or otherwise injured; what was the condition of the right jaw and cheek bone? State particularly.

5th. Was or not the said Derby confined by the injuries he had sustained, (if you should answer that he had sustained injuries;) did he or not suffer any pain; did or did not any fever supervene; did or did not he lose any strength or flesh; was or was not his nervous system affected; was or was not he at any time in a low, dangerous, or precarious state; and has or has not his system sustained any shock?

6th. Did or did not the injury experienced by said Derby in the right arm and shoulder, (if you should have testified that he did sustain such injury,) occasion him more pain than the fracture of the jaw, (if you should have testified that his jaw was fractured;) did or did not such pain shift from arm to arm; and was or not his side affected by such pain?

7th. Were or were not the digestive powers of said Derby affected; and has or has not the use of his right arm been impaired; and how permanent will be the effect from the injury he has sustained?

8th. Do you know anything else material to said plaintiff? If so, state the same as particularly as if thereto interrogated.

FERDINAND W. HUBBELL,
Attorney for plaintiff.

August 10, 1849.

1849, September 25th, a true copy from the original filed.

J. BURCHARD,
For clerk C. C.

In the circuit court of the United States, for the eastern district of Pennsylvania.

DERBY
vs.
THE PHILADELPHIA AND READING RAILROAD COMPANY

The defendants except to the following interrogatories:

First. To the fourth interrogatory proposed to P. P. F. Dogrand.

Second. To the last clause in the second interrogatory in chief to P. P. F. Dogrand.

Third. To the last clause in the second interrogatory in chief to J. E. Thayer.

Fourth. To the last clause of the fourth interrogatory to John L. Andrews.

Fifth. To the sixth interrogatory proposed to Richard Palmer.

Sixth. To the two last clauses in the second interrogatory to Henry Weld Fuller.

Seventh. To the sixth interrogatory proposed to Henry Weld Fuller.

And subject thereto file the following cross interogatories to be administered to witnesses to be examined under the commission of the plaintiff to be issued to Boston, Massachusetts.

Cross interrogatories to be proposed to Lewis Kirk.

Cross interrogatory 1. If you answer the fourth interrogatory in chief affirmatively, state who was on the car or engine "Ariel" at the time you saw it pass up the road, and at what hour of the day it was you so saw it.

Cross interrogatory 2. Was or was not said "Ariel" a passenger engine, or had she or not any passenger cars attached, and was or was not said engine and car reserved for the use of the officers of the company and invited guests?

Cross interrogatory 3. If you answer the fourth interrogatory in chief by stating that you were present when said Derby was invited to go in said "Ariel," state whether any fare or passage was paid or demanded of him, and whether he did or did not accompany the president of said company (the defendants) as a friend and companion, and in order to examine the line of said road.

Cross interrogatory 4. If you answer the sixth interrogatory in chief affirmatively, state whether or not said collision occurred in or at a curve of the road. In what manner was the said Derby injured; was it or not by the direct effect of the collision, or by reason of his having jumped from the car and engine "Ariel" while in motion?

Cross interrogatory 5. Was or was not Mr. Reiff also on the said car and engine at the time; did he or not remain thereupon, and was he or not injured by the collision; from what part of the car and en-

gine, if at all, did said Derby jump, and how far apart were the two engines at the time he did so?

Cross interrogatory 6. Was or was not the "Ariel" injured by the collision; if at all, to what extent; was or was not any part of said engine broken or damaged except the platform in front?

Cross interrogatory 7. If you answer the twelfth interrogatory in chief, state whether or not the person or persons who remained upon the "Ariel" at the time of this collision did or did not escape injury; if said Derby had remained seated, and had not jumped from the engine, would he have been injured by the collision?

Cross interrogatory 8. Does or does not the risk attending an attempt to jump from railroad cars while in motion, depend more or less upon the direction and manner in which the attempt is made?

Cross interrogatory 9. Was or was not the engine "Lycoming" injured by the collision?

Cross interrogatory 10. How did said Derby come to Reading—in the regular passenger trains or otherwise; did he or did he not desire to remain there, to examine the shops a longer time than allowed for the ordinary stoppage of the passenger cars?

Cross interrogatory 11. Did you precede the "Ariel" up the road; did you give all the necessary orders and directions, and use every precaution to have the track clear for the "Ariel?" State minutely and particularly all you did for that purpose, and what such orders and directions were.

Cross interrogatory 12. If you answer the twelfth interrogatory in chief affirmatively, state whether the authority to said Jones was in writing or otherwise.

Cross interrogatory 13. Was your official report of said collision, if any, in writing, and is the paper "A," referred to in the ninth interrogatory in chief the original or a copy thereof; if a copy, by whom made?

Cross interrogatory 14. State any other material matter for the defendants as though specially interrogated thereto.

Cross interrogatories to be administered to John E. Thayer.

Cross interrogatory 1. If you answer the third interrogatory in chief, state minutely and particularly for what purpose the said Derby came to the city of Philadelphia, and the name of each and all of the persons by whom he was so requested; were you or not one of them; if you were present when said Derby was invited by the President of said company to go with him up the railroad, state in what manner and for what purpose he was so invited; was he or was he not to go as a friend and companion of the President to examine the line of the road and the property of the company?

Cross interrogatory 2. Were you present when the collision took place?

Cross interrogatory 3. After said collision, and upon his return to

Philadelphia, to whose house was said Derby taken; under whose care did he remain; how long did he remain in the city; what physician attended him in the city of Philadelphia, and what degree of kindness and attendance was shown to him while remaining there?

Cross interrogatory 4. If you answer the fourth interrogatory in chief, state at what time it was you visited the said Derby in the country; and how do you determine the extent to which his nervous system was affected by the injury he had received?

Cross interrogatory 5. State any other material matter or thing for the defendants as though specially interrogated thereto.

Cross interrogatories to P. P. F. Dogrand.

Cross interrogatory 1. If you answer the third interrogatory in chief, state whether you know of your own knowledge for what purpose the said Derby went to Philadelphia; if aye, state the object of said visit particularly, and give the names of the persons by whom he was employed to go; and were you or not one of them?

Cross interrogatory 2. If you answer the fourth interrogatory in chief, state particularly upon what you base your estimate of damage; are you acquainted with the private affairs and business of the plaintiff; give the name of any client or clients who have ceased to employ him; is he or is he not the president of any Railroad company; if so, what is the name of the company; how long has he been the president thereof, and does he still continue to hold that office; has he abandoned or does he still practice his profession?

Cross interrogatory 3. Have you now, or have you ever, had any business connexion with said Derby?

Cross interrogatory 4. If you answer the fifth interrogatory in chief, state particularly the amount of your interest in the stock or bonds of the said company.

Cross interrogatories to John L. Andrews.

Cross interrogatory 1. Have you now, or have you ever had, any connexion with the said plaintiff in business or otherwise?

Cross interrogatory 2. If you answer the fourth interrogatory in chief, state whether or not your replies thereto are founded exclusively upon your own knowledge; do you mean by emoluments therein [to] refer to his professional receipts?

Cross interrogatory 3. Was or was not said Derby in partnership with any person or persons in June, 1848; if aye, who was then and is now in partnership with him?

Cross interrogatory 4. From whom do you *revive* knowledge of his emoluments?

Cross interrogatory 5. In replying to the fourth interrogatory in chief, do you refer to the professional receipts of the firm of which he was a member; what were the receipts of the said firm for the first eight

months of the year 1848; and what have been the receipts for the first eight months of the year 1849?

Cross interrogatory 6. What salaried office did said Derby hold in June, 1848, and when did he resign it; what was the amount of such salary?

Cross interrogatory 7. If you answer the eighth interrogatory in chief, state your means of knowledge of the facts inquired of; how many cases did the said Derby try in the first nine months of the year 1848; and how many did he try in the first nine months of the year 1849? Give the name of any client or clients who have ceased to employ him.

Cross interrogatory 8. State any other material matter or thing for the defendants as though especially interrogated thereto.

Cross interrogatories to Joshua Tucker.

Cross interrogatory 1. How long have you been employed by said Derby?

Cross interrogatory 2. Did he or did he not, before the summer of 1848, and how long before, use false teeth; how many; did he before that time require a full set?

Cross interrogatory 3. If you should answer the third interrogatory in chief, state in what respect the shape of his mouth was altered.

Cross interrogatory 4. Upon what day in the summer of 1848 did he first call upon you? Refresh your memory by any book or reference kept by you, and fix as near as possible the day of his first visit.

Cross interrogatory 5. State any other material matter or thing for the defendants as though specially interrogated thereto.

Cross interrogatories to be administered to Richard Palmer.

Cross interrogatory 1. Have you had any conversation with any person upon the subject of your examination; have you any paper or memorandum by which you fix times and dates?

Cross interrogatory 2. What was the cause of the relapse of said Derby, if any, after his return from Philadelphia?

Cross interrogatory 3. State any other material matter or thing for the defendants as though specially interrogated thereto.

Cross interrogatories to Henry Weld Fuller.

Cross interrogatory 1. Are you now, or have you ever, been engaged in business, as partner or otherwise, with the said Derby?

Cross interrogatory 2. If you answer the second interrogatory in chief, state if you are acquainted with the private affairs of the plaintiff; was he or was he not in partnership with any person or persons in June, 1845; if aye, who was then and is now in partnership with him; from whence do you derive your knowledge of his emoluments; by his emoluments do you mean the professional receipts of the firm of which he was a member; what were the receipts of the said firm for the first eight months of the year 1848; and what have been its receipts for the

first eight months of the year 1849; what client or clients have ceased to employ him?

Cross interrogatory 3. What salaried office did said Derby hold in June, 1848, and when did he resign it; where did he reside in June, 1848, and where does he now reside?

Cross interrogatory 4. If you answer the third interrogatory in chief, as to the amount of business the said Derby did accomplish, state what branch of the business was specially confided to him, and what number of causes he tried in the first eight months of the year 1848, and how many in the first eight months of the year 1849.

Cross interrogatory 5. If you answer the fourth interrogatory in chief, that you do know of his having made a journey to Philadelphia, give the names of the person or persons by whom he was employed, and the object of his visit.

Cross interrogatory 6. If you answer the sixth interrogatory in chief, give the names of the case or cases in which said Derby "has broken down and been compelled to decline speaking," and the times at which they were tried respectively.

Cross interrogatory 7. State any other matter or thing material to the defendants, as though specially interrogated thereto.

Cross interrogatories to Marshall S. Perry.

Cross interrogatory 1. How long have you been employed as medical adviser for said Derby; how many visits did you pay him in the summer of 1848?

Cross interrogatory 2. What course of diet and medicine did you prescribe for him; what was the date of your first visit to him in June, 1848; what was your charge to said Derby for medical attendance in the summer of 1848?

Cross interrogatory 3. State any other matter or thing material to the defendants, as though specially interrogated thereto.

Cross interrogatories to Horatio Adams.

Cross interrogatory 1. How long have you been employed as medical adviser for said Derby; how many visits did you pay him in the summer of 1848?

Cross interrogatory 2. If you answer the fifth interrogatory in chief, state when the fever, if any, supervened; what was the date of your first visit to him in June, 1848; and what was your charge to said Derby for medical attendance in the summer of 1838?

Cross interrogatory 3. If you answer the seventh interrogatory in chief, state how far the use of the right arm of the said Derby has been impaired; how long was he prevented from writing?

Cross interrogatory 4. State any other matter or thing material to the defendants, as though specially interrogated thereto.

ST. GEO. T. CAMPBELL,
For defendants.

September 13, 1849.

2/09.

1849, September 25th. A true copy from the original filed.

J. BURCHARD,
For clerk C. C.

UNITED STATES OF AMERICA,
District of Massachusetts.

Depositions of witnesses, produced, sworn, and examined, on the twelfth day of October, 1849, at the house of the subscriber, in the city of Boston, in Massachusetts, by virtue of a commission issued from the circuit court of the United States, in and for the eastern district of Pennsylvania, in the third circuit, to me, Charles Levi Woodbury, esquire, directed, for the examination of witnesses in a certain cause depending in said court, wherein E. H. Derby, a citizen of the State of Massachusetts, is the plaintiff, and the Philadelphia and Reading Railroad Company, citizens of the State of Pennsylvania, are defendants.

Lewis Kirk, being duly sworn and examined on behalf of the plaintiff, deposeth and saith, in answer to the first interrogatory, as follows, to wit:

My name is Lewis Kirk; residence Cambridgeport; my occupation is a machinist.

In answer to the second interrogatory. I do know him.

To the third. I was in their employ, in the capacity of master machinist and foreman. I had business that day on the road, and passed up the road that far.

To the fourth. I saw them at that place. The president of the road had telegraphed me to have the Ariel ready when the passenger train from below should arrive there. I understood Mr. Tucker to say to me, that he wished to take Mr. Derby up in the Ariel to show him the road; did not hear him invite Mr. Derby to go.

To the fifth. The Ariel is a small engine, about four tons weight, built for an express engine, about eleven feet long, mounted on four wheels; it was so constructed that the passengers rode on the engine, seats being arranged parallel to the boiler, one on each side, and one over the boiler, like an omnibus, very much. A roof, supported by stanchions, covered the whole. It was a crank engine, and all the machinery was underneath the floor of the passenger part. A tender, constructed in the usual form, with brakes, &c., was attached; the steps to mount to the passengers' seats were in front of the engine. The communication with the engineer's position was over a partition about three feet high. This daguerreotype attached, marked exhibit AA, is a faithful representation of the car-engine Ariel and her tender.

To the sixth. It was probably thirty minutes after the accident happened before I was on the ground. I found that they had taken Mr. Derby up from where he fell, and he was laying on the grass beside the road; when I first came to him I spoke to him; he did not appear to know I was there; was muttering to himself, and did not appear to know what was going on about him. In a few minutes he began to

complain of his jaw; we got a chair from a house near, and carried him up six or eight rods to a farm house; we washed the blood off from him, adjusted his clothes, and fixed him up as well as we could. The superintendent sent back to the Orwigsburgh bridge for a car, and took him down to Reading; he was in a very bad condition; I thought he would never recover.

To the seventh. Mr. Tucker evidently thought Mr. Derby could never recover; he was expressing his regret, and wondering how the Lycoming could have been on that track; this was the general tone of his conversation.

To the eighth. I have already answered, he was spitting blood from his mouth, and throwed or gagged out of his mouth clotted blood, and complained of being sick at his stomach.

To the ninth. I was requested by the President to make a report which I did; it was correct. I have examined exhibit A, it is all in my handwriting, and is the original by me made on the occasion.

To the eleventh. When I went down the line to Reading, I ordered the track kept clear till my return. I ordered Mr. Burns, agent of station at port Clinton, not allow any thing to pass up till my return. At that time, we were compelled to use only a single track at this portion of the road. At Reading, I met Mr. Tucker, and Mr. Derby, who waited to come up in the Ariel. I went back up the line in the regular passenger train. I told Mr. Tucker I would have a clear track for him; he said he would follow us immediately. On my arrival at port Clinton, I told Mr. Burns that Mr. Tucker would be up immediately in the Ariel, and nothing must be allowed to pass until after Mr. Tucker had come up. I went on, and at Auburn sideling, I saw an engine on the sideling which, I supposed, was one sent there by Mr. Steele, engineer, to bring lumber up to the bridge. This is all I know, of my own knowledge, prior to the collision. After the collision, I saw the Lycoming engine on the curve, fifteen or twenty feet from the Ariel, and in a damaged state. She was a fourteen ton engine. I saw J. P. Jones, conductor of the Lycoming, and his brother, the wood agent of the road, both standing near Mr. Derby, when I got there. The facts stated in my report as of my own knowledge are true; those which, from my answers here, must evidently appear to be the result of investigation, I believe to be true, and I make said report, exhibit A, a portion of my answer to this interrogatory.

To the thirteenth. I do not know that I do.

To the cross interrogatories exhibited by the defendants, he answereth:

To the first. I did not see her pass up the road at all. I left her at Reading, about eleven o'clock, a. m.

To the second. She was designed for carrying passengers, but no car was attached to it, or was it designed that she should haul passenger cars; it was intended for the use of the officers of the road; guests frequently rode on it.

To the third. I do not know.

To the fourth. The collision occurred on a curve. I have answered

where he was injured. I judged from the appearance of Mr. Derby that his injuries were produced by his having come violently in contact with the ground or sills; and further knows not.

To the fifth. I know nothing.

To the sixth. The Ariel was badly injured; the platform in front was broken off; the frame and machinery were also somewhat injured.

To the seventh. I do not know; the seats of the Ariel being parallel or nearly with her line of motion, the shock of the collision would probably have thrown any one from the seats forward, against the other engine, with great force.

To the eighth. It does.

To the ninth. The bumper was knocked off; no serious injury to her.

To the tenth. He came in the regular passenger train. I do not know what his desire was.

To the eleventh. I did precede the Ariel, and gave all the necessary orders, and used all precautions to have the track clear for the Ariel; I have already described, in my answer to the 11th direct, what I did.

To the twelfth. I do not know.

To the thirteenth. It is the original.

To the fourteenth. I don't know of anything more to say.

LEWIS KIRK.

CHARLES LEVI WOODBURY,
U. S. commissioner.

A.

READING, *June 17th*, 1848.

JOHN TUCKER, esquire,
President of the Philadelphia and Reading railroad.

DEAR SIR: I send, as you requested, a report of the accident to the "Ariel" engine, on Thursday last, the 15th inst.

On Wednesday morning, at 4 o'clock, the 3d crossing bridge on the Schuylkill, 26 miles above Reading, was destroyed by fire, by which several up empty trains *was* delayed below that point, blocking up the up track, and requiring the down track to be used for six miles, as a single track, by engines hauling passenger trains, materials, men, &c., until the completion of the bridge, at 2½ p. m., on Friday, the 16th. Early on Thursday morning I passed down the line on this piece of single track, for the purpose of bringing a fresh supply of men from Reading to assist at building the new bridge, leaving strict orders with Mr. Burns, the agent at Port Clinton, that no train should pass over this piece of single track until I returned from Reading. Soon after I left, J. P. Jones, conductor of the wood train, passed up this track, contrary to the general rules of the road and the directions of Mr. Burns, stating that he (Jones) would take all the responsibility of going. He remained at Auburn, a wood station siding, until the up passenger train, in

which I was, passed, and then started down the line without orders. The "Ariel" had been directed to be ready to take you on from Reading behind the up passenger train; and, on your arrival at Reading, I informed you that you would have a clear track all the way to the bridge, in the "Ariel," behind the passenger train, up the line. You started, following these directions, and, about three miles above Port Clinton, met the "Lycoming," started down the line, as above stated, by J. P. Jones. With the result of the collision, and the unfortunate injury sustained by Mr. Derby, you are well acquainted. The "Lycoming" engine passed up the road, and on the single track, contrary to my directions; and I therefore consider J. P. Jones, conductor of the Lycoming, the cause of the accident. In passing Auburn, in the passenger train, I observed an engine standing in the siding, but thought she was hauling lumber for the bridge, and did not see him start down the line. Mr. Nicolls was, at the time of the accident, at the bridge, which he had not left since he first arrived there on Wednesday.

I am, very respectfully, your obedient servant,

LEWIS KIRK.

This is the paper or document referred to by Lewis Kirk, in his examination, as exhibit A, signed by witness, and made part of his answers.

CHAS. LEVI WOODBURY,
U. S. commissioner.

Deposition of Horatio Adams.

And on this twentieth day of November, in the year eighteen hundred and forty-nine, before me, came Horatio Adams, of Waltham, who, being duly sworn and examined on behalf of the plaintiff in said cause, did depose and say, as follows, to the interrogatories exhibited on behalf of the plaintiff, and the cross interrogatories, to wit:

To the first he says: Horatio Adams, physician; reside at Waltham; have been twenty-three years in the profession.

To the second. I have known him for six or seven years; he is a lawyer by profession.

To the third. He resided in West Newton, about two miles distant from my house; I was called upon to attend him the last of June, or very early in July, and understood that he had just returned from Philadelphia.

To the fourth. I cannot give a more exact date than above. I found him then weak, and suffering pain about the jaw, right arm, and right side of chest; the right arm he complained of a good deal of pain about the shoulder; some swelling in the same region; an inability to raise the arm, or to allow it to be raised beyond an angle of forty-five degrees from his side; any motion of the arm was painful at the shoulder joint; his side he complained of a good deal of pain there, particularly

in the region of the liver, and extending up under the right shoulder blade; in connexion with this, the billiary system seemed a good deal disturbed; his cheek was swollen, bruised, tender to the touch, and portions of the cheek and around the right eye discolored; all these portions were bruised and discolored; the under jaw was fractured on the right side; there was a fracture of the cheek bone and a depression of the same. The ulviolar processes, or the teeth sockets of the upper jaw, were also injured.

To the fifth. Mr. Derby suffered a great deal of pain; he was a month or six weeks under my care directly; he was very much reduced, and lost a great deal of flesh; his nervous system was very much deranged, in consequence of the shock he had sustained, and fever supervened, which confined him to his bed between two and three weeks, a portion of which time the fever still farther prostrated him, so that for several days I considered his situation as precarious; at the present time he is incapable of raising his arm freely, at more than a right angle to the body, which embarrasses him much in every act which he has to perform about his head, as shaving, tying his cravat, and even in putting on his coat, &c.; all this loss of the motions of the arm are consequent of an injury to the deltoid muscle, which as yet remains permanent.

To the sixth. While under my care he complained much more of pain about the arm than about the jaw; his side was very much affected by the pain; I do not remember whether or not the pain shifted from arm to arm.

To the seventh. The digestive powers were very much affected; the use of his right arm is very much impaired.

To the eighth. I considered Mr. Derby's sufferings, while he was under my care, as very great, and that they were entirely consequent on the shock he had received.

To the cross interrogatories.

To the first. I had never been employed by Mr. Derby before this accident; I paid him about twenty-five visits.

To the second. He paid me twenty-five dollars for attendance; I think the fever supervened in the course of my first week's attendance on him; I cannot give the exact date, as my books are not here; I recollect visiting him on the fourth of July, but I do not remember whether or not this was my first visit to him.

To the third. I think he did not ride under four weeks from when I first saw him, and then there was a good deal of embarrassment about it; I do not think he attempted to write until the latter part of the time he was under my care, and then he could not write with any freedom; he had to drop his arm almost perpendicular to write.

To the fourth. I know of nothing more.

HORATIO ADAMS.

CHAS. LEVI WOODBURY,
U. S. commissioner.

Deposition of Marshal S. Perry.

Deposition of Marshal S. Perry, a witness for the plaintiff, produced before me on the twenty-fourth day of October, in the year eighteen hundred and forty-nine, and being by me duly sworn, did depose and say, in answer to the interrogatories and cross interrogatories exhibited by the plaintiff and defendants respectively, as follows, to wit:

To the first interrogatory. Marshal S. Perry, No. 16 Revere street, Boston; occupation a physician; have been nineteen years in practice.

To the second. I know the plaintiff; I saw him here in the city, on his way to Newton, the morning he arrived here; he had been severely injured; his lower jaw was fractured; it had been set by some physician before his arrival; the upper jaw, just where the prominence of the check is, had evidently been fractured; there was an indentation there; I could not tell how severe that fracture was at the time; it gave a one-sided or twisted appearance to the upper part of the face. Since then, it is evident, a part of the bone there has been absorbed; one or two of his teeth had been knocked out; I cannot say how many, several I think; the whole face had an echymosed appearance, or was black and blue throughout; the right arm was injured, but I could not find any fracture or dislocation of it; evidently that side had received a very severe blow; the muscles and nerves were both injured, and there was almost a complete paralysis of the arm; there was echymosis on all this side and arm, down to the bottom of the ribs; the pectoral muscle seemed to be somewhat bruised; he was very feeble; great prostration of strength; there were all the indications of a severe shock and bruise.

To the third. I attended him afterwards; his digestive powers were affected; his whole system seemed to have received a severe shock, I think caused by the injuries he had sustained; I have been obliged to prescribe for him a rigid regimen and exercises for his arm, to recover, if possible, the use of that limb.

To the fourth. Answers affirmatively to each part of this interrogatory.

To the fifth. They affected his health at that time seriously, and they then seemed as if they would be a permanent injury to him. These injuries have affected his appearance also, and I doubt if he will ever recover the complete use of his right arm; I don't think he has ever recovered entirely from that shock, though I think his health has been gradually improving.

To the sixth. He knows not.

To the cross interrogatories.

To the first. I have been for three or four years his medical adviser. I saw him several times a week, for some weeks, and once or twice a week, for some months; cannot say the exact number of times without referring to my book. Part of the time that summer he was attended, partially, by Dr. Adams, of Waltham.

To the second. I put him upon a very simple diet. I gave him but

little medicine, except to keep his bowels regular; the diet was very rigid; my object was to prevent secondary inflammatory symptoms; the local treatment was principally evaporating lotions. My bill was one for the year, mixed up with attendance on his own family. I think the portion of it, consequent on this injury of Mr. Derby, was thirty or forty dollars.

To the third. I don't know of any thing.

M. S. PERRY.

CHARLES LEVI WOODBURY,
U. S. Commissioner.

Deposition of Joshua Tucker.

Deposition of Joshua Tucker, a witness for the plaintiff in the title of the above cause, produced before me, October twenty-sixth, at my office in Boston, and being by me duly sworn, did depose and make answer to the interrogatories exhibited by the plaintiff, and the cross interrogatories exhibited by the defendants, as follows, to wit:

To the first interrogatory. Joshua Tucker, aged forty-nine; residence, in Hamilton Place, Boston; a dentist by profession.

To the second. I know him, and have operated for him for a number of years past. I extracted a number of teeth and inserted some new ones.

To the third. After this accident, Mr. Derby came to me to have his teeth replaced, and his jaw was so weak that he could not open his mouth wide enough to have his teeth replaced. After waiting a few weeks, I tried again, but could not make them fit, because the shape of the mouth had so altered, that the plate on which the teeth were, would not fit on where it had done before the accident. The natural teeth to which the plate of [the] false teeth had formerly been secured, were pressed out of their old position and inclined from the gums inward, in such a way that the old plate could not be fitted. This also showed me that the upper jaw was contracted or compressed. Derby was subjected to much expense by this, as I had to make a new cast of his mouth, and to make a new plate and fit teeth into it; it cost him sixty dollars, and took up a good deal of his time, and other inconveniences to him.

To the fourth. Sixty dollars.

To the fifth. I don't know that I do.

To the cross interrogatories.

To the first. Certainly, nine or ten years, perhaps a dozen years.

To the second. Before this accident, he wore five or six false teeth; he does not now use a full set.

To the third. The natural teeth upon the upper jaw, in front, were gone, and the plate, after the accident, would not fit on to the side teeth to which it formerly fitted, because these natural teeth had been

pressed inward by the alteration, viz., contraction of the jaw. The effect of this was that the plate of teeth formed in front of the mouth a larger circle than did the gums, and hence would not fit, but projected over their proper place.

To the fourth. I cannot tell, even by my book; I can tell the time when I did the work of making the teeth; he first called two or three weeks before.

To the fifth. There is nothing more that I can say.

JOSHUA TUCKER.

CHARLES LEVI WOODBURY,
U. S. Commissioner.

Deposition of Richard E. Palmer.

Deposition of Richard E. Palmer, a witness for the plaintiff, produced before me, this twenty-second day of October, in the year eighteen hundred and forty-nine, and being duly sworn and cautioned to depose, without favor or affection to either party, on his oath did depose and say, as follows, to wit:

To the first interrogatory. I am twenty-five years old last August; reside in Boston with the plaintiff; am called Richard E. Palmer; am at work in his family.

To the second. I resided in his family, and in May, 1848, I removed to Newton with said family. I saw him until he left home for Philadelphia, from whence, at which time, the news came that he was hurt. Before he left home, his health was as good as usual; he seemed perfectly active and well; he seemed, before he left home, to be full of business; he used to leave home at 6½, a. m., and return at 7, p. m., and quite frequently seemed to be busy in the evening.

To the third. I have since lived in his family. I went down to the depot at Newton for him, when he came home. He was very badly bruised; his face was disfigured; he was lame and stiff; he was so much altered that when he came to the house the small children did not know him; he was not able to undress himself or to dress himself; to eat, carve, or shave himself; his eye was very badly blacked and bruised; his cheek was very badly swollen; his arm was stiff; his jaw was broken. He had not these appearances before he went to Philadelphia.

To the fourth. He did require such help; I assisted him sometimes, and sometimes Mrs. Derby did. I think, for six weeks or longer, he was obliged to sleep on one side. Dr. Hewitt and Dr. Adams made applications to his person, and Dr. Adams attended him through a fever; they are now discontinued, and have been since some time in last winter, except a wash for his shoulder, which is still used, but I am not sure which doctor it is from. He cannot get on his coat with his right arm, or turn up the collar, or carve; and in writing, he takes the pen out of the stand with his left arm and puts it into his right hand; he cannot reach up to get any thing; he has a weight which he

has used ever since he came in town a year ago; it is fixed with two pullies and a rope, and he uses it so as to get the action and strength of his arm again. Dr. Perry has attended him since he came in town, and much oftener than usual before he went to Philadelphia.

To the fifth. He suffered from pain after such return; he lost about twenty pounds of flesh, and was confined for a number of weeks to the house, and was, for a long space of time, so weak he could scarcely get up or down stairs; his jaw was bandaged three or four weeks, in which time he eat nothing except what he could drink.

To the sixth. He had a relapse; was alarmingly ill; I was called up in the night and supposed he was dying. He was taken with a cold sweat and groaned; made a strange noise; seemed to lay senseless and be troubled for breath; he remained an hour in this way, and he continued, for quite a number of days, very weak and feeble, so he could not leave his room; this commenced about a fortnight after his return.

To the seventh. He has lived upon dyspepsia bread and has drunk camomile tea before dinner, pretty much every day since this accident happened. He has, to my mind, bore every appearance of living on diet and by rule, and been careful of exposing himself, more so than usual.

To the eighth. I waited on him and shaved him while he was ill and lame, and assisted him in taking care of him, putting on his overcoat. It was very difficult to shave him; his teeth were gone; his face was sore, outside and in. I used to rub him, and to have to exercise his arm myself, by raising and moving the same, for he had no use of it at all.

To the cross interrogatories.

To the first he says: I have had no conversation with any one on the subject of your examination; have no memorandum except my memory.

To the second. I think the cause of his relapse was from his accident; know no other.

To the third. I do not know anything more than I have stated, except a fever set in on him about a fortnight after he got home. I never knew of his having one before; think it grew out of the accident.

RICHARD E. PALMER.

CHAS. LEVI WOODBURY,
U. S. commissioner.

Deposition of Henry Weld Fuller.

Deposition of Henry Weld Fuller, esq., of Boston, a witness on the part of the plaintiff, who being by me duly sworn, on this twenty-seventh of October, eighteen hundred and forty-nine, and examined at my office, in Boston, did depose and say, in answer to the interrogatories, as follows, to wit:

To the first interrogatory. Henry Weld Fuller; reside in Boston; am a counsellor at law; place of business in Devonshire street, corner State street.

To the second. (Ruled out by the court.)

To the third. He had great power of endurance, and seldom, if ever, was kept from business by ill health; he accomplished more business in the same time than any person I most ever met; he was an early and late worker.

To the fourth. I know he started for Philadelphia, June 12, 1848, and from telegraphic despatches, received some days after, from Mr. Tucker, president of the Reading railroad, I knew he was there. He was in good health when he left, and was wretchedly when he returned. I had, previous to his return, been informed, by telegraphic despatches, of his accident or injury on the railroad; and while I expected to find him injured somewhat severely, yet when I first saw him at his house, after his arrival from Philadelphia, I was much surprised to find him weaker and more bruised than I had been led to anticipate; his face was more one-sided, his skin upon the shoulder and chest, and other parts of the body blacker, and more generally orange colored, and the bruises seemed more extensive than I had hoped to see. His teeth appeared to have been lost, his cheek bone on the right side appeared to have been flattened or driven up, or in, and his head, I think, was cut; he also was quite lame, and his arm nearly immoveable. He was, almost immediately after his arrival here, carried to his country house, where I visited him, and there he very soon fell away in flesh; became alarmed about himself; was confined to his room, and appeared for some time to be in a very precarious condition. I thought, for a time, he was about to die.

* * * * * * * * *

I think he has improved, more or less, every month during the past year; and last month, for the first time, I noticed that he was able to dip his pen into the inkstand on his table with his right hand; heretofore he had been obliged to dip the pen with his left hand, and change it into his right after it was filled; his face is not greatly disfigured, but will always be one sided; his shoulder, (right,) appears to be higher up than the left, and he cannot yet use his right arm with freedom.

To the fifth. * * * * His manner of carrying his injured arm is somewhat awkward; the left side of his face appears fuller than the other; in other respects his appearance is about as it was, as science has restored the appearance of his mouth.

To the sixth. (Ruled out by the court.)

To the seventh. I know not.

To the cross interrogatories.

To the first, second, third, and fourth. (Ruled out by the court.)

To the fifth. Mr. Derby, who was quite a large stockholder in the Reading railroad, and other persons, friends of his, who in some meas-

ure relied on his judgment, were anxious to investigate the accounts of that corporation, and to look into its management and true condition; and although he was not employed, to my knowledge, as that phrase is usually understood, yet he was moved by his own feelings and interests, and those of his friends, to go to Philadelphia for that purpose, and before accomplishing it this accident occurred; he thereupon returned home, and retained the stock which he held. * * *

To the sixth and seventh. (Ruled out.)

H. WELD FULLER.

CHAS. LEVI WOODBURY,
U. S. Commissioner.

Deposition of P. P. F. Degrand

And on this eighth of November, before me came P. P. F. Degrand, who being duly sworn as a witness examined for the plaintiff, did depose and answer as follows to the interrogatories exhibited on behalf of the plaintiff, and to the cross interrogatories, to wit:

To the first interrogatory. My name is P. P. F. Degrand; occupation a stock and exchange broker; residence in Boston for forty-four years past, with the interruption of about two years.

To the second. (Ruled out.)

To the third. I am aware that he went to Philadelphia in June, 1848, to attend a meeting of the stockholders of the Reading Railroad Company, and to represent a large amount of the stock of that road, owned in this neighborhood, say perhaps a million of dollars of said stock; I knew the facts, because I was one of those who employed him. * *

When he went away he was in the full enjoyment of health, in body and mind; when he returned he was absolutely prostrate and powerless, in body and in mind; I saw him quite a number of times, and his recovery from this prostration was slow; his face was cut through the cheek; his teeth were knocked off; his right arm was powerless; his power of writing was reduced to merely writing his signature, with painful effort, and even this, I should judge, he could not do the first day I saw him after his return.

To the fourth. (Ruled out.)

To the fifth. I am; my interest consists of fifty shares of stock, one hundred and twenty shares of preferred stock.

To the sixth. (Ruled out.)

To the cross interrogatories.

To the first. I have answered all this but the names of the persons; they were John E. Thayer and Brother, and Charles A. Read, and generally the stockholders in this vicinity.

To the second. * * * * * His arm being much less able to perform its proper functions than before the accident; his face and his speech are somewhat affected by the injuries.

* * * * He has not abandoned his profession as a lawyer.

To the third. I have done a good deal of business for Mr. Derby, as his broker; I have no interest in his business, and have never had.

To the fourth. I have stated it what it now is, but supposing it may be meant by the interrogatory to know the amount of my interest in June, 1848, I state, that I then held a large amount of the bonds of the company, which I have since sold; I do not exactly recollect the amounts and stock also. P. P. F. DEGRAND.

CHAS. LEVI WOODBURY,
U. S. Commissioner.

Deposition of John E. Thayer.

Deposition of John E. Thayer, a witness on behalf of the plaintiff, produced before me, this twenty-eighth of November, in said cause, and who, being duly sworn, did depose and say, in answer to the foregoing interrogatories and to the cross interrogatories, as follows:

To the first interrogatory he says: John Elliot Thayer; reside in Boston; occupation a broker and banker.

To the second. I have known him for twenty years. * * * *

To the third. Mr. Derby had an interest in the affairs of that road, and went on with me to attend the meeting of that corporation. I cannot say that I requested him to go. He did attend their meeting, and I know had a large number of proxies as well as his own stock to represent. I did not hear Mr. Tucker invite him; my hearsay from others, I presume, is not evidence. I have no doubt that he sustained injury on the road; I was not present; I know that he returned from the trip much injured.

To the fourth. I left Philadelphia before Mr. Derby's return from this trip on the Reading road, and the first that I saw of him after my leaving, was at Newton, near Boston, to which place, his country residence, I rode to see him. I found him, as I thought, very much injured indeed, and, as I thought, very feeble. I supposed it very doubtful if he would ever recover. I am not surgeon enough to say what injuries he had sustained. His general appearance was that of a man who had suffered severe injuries or pain. I thought his nervous system affected; I thought him a very sick man.

To the fifth. I hold a very considerable interest in the corporation; I cannot say what is the exact amount. I have both a direct and an indirect interest, amounting certainly to at least fifty thousand dollars.

To the cross interrogatories.

To the first. As far as I know, Mr. Derby went on to represent his own interest and that of others; but I see continually so many proxies signed, that I cannot say who signed these. I believe the object of the meeting was to consider on the subject of the allowance, on the eighteen hundred and fifty-six bonds, of a bonus to those who took

them. My purpose, and Mr. Derby's also, so far as I understood him, was to see generally how affairs looked, as well as to represent views, &c., on the special question before the meeting. I know of no particular object, other than this, that Mr. Derby had. I do not recollect being present when Mr. Derby was invited.

To the second. I was not.

To the third. Mr. Derby told me he was taken to Mr. Tucker's (the president's) house; he said that he remained in his house while he remained in Philadelphia. I don't know what physician attended him. He told me he received every attention and kindness from Mr. Tucker and his family.

To the fourth. It was some time after his return I went out to see him at Newton, but cannot say what was the exact time; neither can I pretend to determine the extent of his illness, except as answered in chief.

To the fifth. I don't know any thing particular, except that Mr. Derby, at the railroad meeting, spoke and submitted resolutions to the meeting.

JNO. ELIOT THAYER.

CHAS. LEVI WOODBURY,
U. S. Comm.

ELIAS H. DERBY
vs.
THE PHILADELPHIA AND READING RAILROAD CO.

Assignment of errors.

I. The learned judge erred in charging the jury as requested by the plaintiff.

II. The learned judge erred in charging the jury that if one of the agents of the defendants used no diligence at all, then the defendants could not be said to have shown even slight diligence; the evidence being, that the said agent selected by the defendants had the reputation of a competent and faithful man.

III. The learned judge erred in charging the jury that the defendants are liable for the disobedience of their servant; the evidence being that such servant was reputed competent and faithful, and such act being committed in violation of their express orders.

IV. The learned judge erred in refusing to charge the jury, as requested, on the 5th, 6th, and 7th points of the defendants.

V. The learned judge erred in charging the jury that the plaintiff, being lawfully on the road of the defendants, with their consent, it made no difference, in the law of the case, whether he paid fare or not, or whether he was there as the guest of the defendants.

W. M. MEREDITH,
ST. GEO. T. CAMPBELL,
S. G. FISHER,
For plaintiffs in error.

December 8, 1851.